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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE, PETITIONER,

vs.

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED SEPTEMBER 15, 1964

CERTIORARI GRANTED DECEMBER 7, 1964

SUPREME COURT OF THE UNITED STATES

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IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,441

Civil Action (Docket No. 90028)

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners-Appellants,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent-Appellee.

On Appeal from Decision and Judgment of the Tax Court of the United States

Appendix for Petitioners-Appellants.—Filed September 17, 1963

[File endorsement omitted.]

[fol. 2] BEFORE THE TAX COURT OF THE UNITED STATES

RELEVANT DOCKET ENTRIES

Date Mo. Date Yr.	Filings and Proceedings
Nov. 21, 1960	Petition Filed: Fee Paid 11/21/60
• • • • • • •	
Jan. 25, 1961	Amended Petition by petr. filed
Feb. 10, 1961	Answer to Amended Petition filed by resp.
• • • • • • •	
Nov. 28, 1962	Findings of Fact and Opinion filed. Judge Raum Decision under Rule 50.
Jan. 3, 1963	Agreed Computation filed.
Jan. 8, 1963	Decision entered, Judge Raum
• • • • • • •	
April 5, 1963	Petition for Review by USCA, 3rd Cir., filed by petrs.
• • • • • • •	

[fol. 3] BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90028

IN THE MATTER OF THE ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

AMENDED PETITION—Filed January 25, 1961

The above named petitioners hereby petition for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing symbols Au:R:JB dated August 24, 1960 as amended by

letter dated October 31, 1960 bearing symbols AR C:Ap: PHI Nwk: MM and as a basis of their proceeding allege as follows:

1. The petitioner William H. Frantz is an executor and petitioner, Ruth M. Noel, is substitute executrix under the last will and testament of Marshal L. Noel, the latter hav-[fol. 4] ing been so appointed by the Bergen County Court, Probate Division, Bergen County, New Jersey, on July 27, 1956. Both petitioners have duly qualified and so continue to act as said executors. The petitioner, William H. Frantz, resides at P.O. Box 509, Pinehurst, North Carolina. The petitioner, Ruth M. Noel resides at 286 Mountain Avenue, Ridgewood, New Jersey. The federal estate tax return herein involved was filed with the District Director of Internal Revenue, Newark, New Jersey.

2. The notice of deficiency, a copy of which is attached hereto and marked Exhibit A, was mailed to the petitioners on August 24, 1960.

3. The Commissioner determined a deficiency in the federal estate tax in the amount of $17,298.10, the entire amount of which is in controversy.

4. The determination of tax set forth in said notice of deficiency, as amended, is based upon the following error:

. . . . . .

(b) The Commissioner erroneously determined that the proceeds of Continental Casualty Co. Aviation Flight Policy UPC 19-023256 (Schedule D Item 5) paid to decedent's widow, Ruth M. Noel, in the amount of $62,500 were includable in decedent's taxable estate.

(c) The Commissioner erroneously determined that the proceeds of Fidelity & Casualty Co. of N.Y. Airline Trip Insurance Policy No. 643984 (Schedule D, Item 6) paid to decedent's widow, Ruth M. Noel, in the amount of $62,500 were includable in decedent's taxable estate.

. . . . . .

[fol. 5] 5. The facts upon which petitioners rely as the basis of this proceeding are as follows:

. . . . . .

(b) Decedent at and prior to his death was an officer and stockholder in Maquinarias Bolivar C.A., a Venezuelan corporation which had recently been formed to sell and service large machinery and equipment, primarily of American manufacture, in Venezuela.

(c) The establishment of the business of Maquinarias Bolivar C.A. made necessary frequent trips by decedent between New York City and Venezuela as well as between New York City and other cities in the United States.

(d) Decedent's personal and business interests necessitated considerable travel, both foreign and domestic, which was generally accomplished by commercial air lines.

(e) Decedent was a passenger on an LAV (Venezuelan Airlines) flight which departed from New York International Airport on the evening of June 19, 1956 on route to Caracas, Venezuela. The plane crashed into the Atlantic Ocean off the coast of New Jersey early June 20, 1956. There were no survivors.

(f) As was her custom in connection with her husband's travel, decedent's wife, Ruth M. Noel, drove decedent to New York International Airport from their home at Ridgewood, New Jersey, on the evening of June 19, 1956 and accompanied him into the Airport terminal. Decedent's wife remained with decedent in the Terminal until he boarded the plane. While at the Airport Terminal de- [fol. 6] cedent's wife was present while decedent signed the application for the flight policies No. UPC19-023256 issued by Continental Casualty Co. and No. 643984 issued by Fidelity & Casualty Co. of New York. Each application was signed by decedent, at a desk maintained by or on behalf of the insurance companies, for $62,500.00 which was the maximum coverage then available on each policy.

(g) The application for said policies, to meet the requirements of the insurance companies, were signed by decedent at the instance and request of his wife, Ruth M. Noel, the said designated beneficiary therein immediately prior to his departure from Idlewild International Airport, New York, New York, on the flight resulting in his death.

(h) Decedent directed the agents of the insurance companies to deliver the policies, when issued, to his wife, Ruth M. Noel, who he considered to be the owner thereof in all respects. After issuance the policies were delivered

to decedent's wife, Ruth M. Noel. Decedent never had possession or control of the policies. Mrs. Noel surrendered the policies in connection with her claim as the named beneficiary therein and received $62,500, the death benefit under each policy.

(i) Decedent held no incidents of ownership in the aviation flight policies above referred to.

(j) The said aviation flight insurance contracts do not conform to the parties' agreement in that the provision reserving to the insured the right to change the beneficiary was included in the policies without the consent of decedent. The provisions were contrary to decedent's intention. [fol. 7] (k) All right, title and interest in the said policies was owned and possessed, at all times, by decedent's wife, Ruth M. Noel, the designated beneficiary.

(l) Whatever right, title or interest decedent may have had in the said policies were contemporaneously and irrevocably disposed of by him.

(m) Decedent at no time had possession or control of the said policies.

(n) Even if decedent had any incident of ownership whatever in said policy or policies, it was impossible for decedent, either solely or in conjunction with any other person, to exercise any such incidents of ownership.

* * * * * * * *

Wherefore petitioners pray that this Court may hear the proceeding and determine that there is no deficiency in estate tax.

Edward F. Merrey, Jr., Counsel for Petitioners, 140 Market Street, Paterson 1, New Jersey. Harry Norman Ball, Counsel for Petitioners, 420-30 6 Penn Center, 16 North 17th Street, Philadelphia 3, Pennsylvania.

(Exhibit A, Annexed to Amended Petition, is omitted.)

[fol. 8] BEFORE THE TAX COURT OF THE UNITED STATES

ANSWER TO AMENDED PETITION—Filed February 10, 1961

The Respondent, in answer to the amended petition filed in the above entitled case, admits and denies as follows:

1. Admits the allegations of paragraph 1 of the amended petition.

2. Admits the allegations of paragraph 2 of the amended petition.

3. Admits the allegations of paragraph 3 of the amended petition.

4. (a) to (f) Denies the allegations of paragraphs 4(a) to (f), inclusive, of the amended petition.

5. (a) Denies the allegations of paragraph 5(a) of the amended petition.

(b) to (d) Denies knowledge or information sufficient to form a belief as to the truth of the statements alleged in paragraphs 5(b) to (d), inclusive, of the amended petition.

(e) Admits the allegations of paragraph 5(e) of the amended petition.

(f) Denies knowledge or information sufficient to form a belief as to the truth of the statements alleged in paragraph 5(f) of the amended petition.

(g) to (p) Denies the allegations of paragraphs 5(g) to (p), inclusive, of the amended petition.

6. Denies generally each and every allegation of the amended petition not hereinbefore specifically admitted, qualified, or denied.

[fol. 9] Wherefore it is prayed that the relief sought in the amended petition be denied.

R. P. Hertzog, Acting Chief Counsel, Internal Revenue Service.

Of Counsel: Cecil H. Haas, Regional Counsel, Francis X. Gallagher, Assistant Regional Counsel, John J. Hopkins, Attorney, Internal Revenue Service.

P. O. Box 1279, Newark 1, New Jersey

[fol. 10] BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90028

ESTATE OF MARSHAL L. NOEL, DECEASED, ETC., Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Room 300
United States Custom House
Philadelphia, Pennsylvania

Transcript of Testimony—Tuesday, February 6, 1962

Met pursuant to notice, at 2:30 p.m.
Before: Honorable Arnold Raum, Judge.

APPEARANCES:

HARRY NORMAL BALL, ESQ., Six Penn Centre, Philadelphia 3, Pennsylvania, appearing on behalf of Petitioner.

EDWARD F. MERREY, JR., ESQ., 140 Market Street, Paterson, New Jersey, appearing on behalf of Petitioner.

H. DONALD BUSCH, ESQ., Six Penn Centre, Philadelphia 3, Pennsylvania, appearing on behalf of Petitioner.

ALBERT SQUIRE, ESQ., Office of Regional Counsel, Internal Revenue Service, Philadelphia, Pennsylvania, appearing on behalf of Respondent.

[fol. 11] COLLOQUY

(3)* PROCEEDINGS

The Clerk: Docket Number 90028, Estate of Marshal L. Noel, deceased.

Will counsel please state your appearance.

Mr. Ball: Harry Normal Ball for petitioner.

Mr. Squire: Albert Squire for respondent.

Mr. Ball: If it please your Honor, counsel have stipu-

* All figures in parentheses indicate the number of each new page of the stenographic transcript.

lated with most of the matters involved in the deficiency notice and have also stipulated with respect to the remaining matter which involves the includability of the proceeds of accident insurance policies.

In the stipulation there were Exhibits D, E and F which were attached which we have agreed are correct exhibits but I should like to note my objection to the relevance of those exhibits: with the exception of that, the stipulation is correct in other respects.

The question before your Honor is whether or not under the circumstances here the proceeds of so-called single flight accident policies covering the decedent which were taken out at the International Airport prior to a scheduled flight by the decedent to Venezuela and which matured as a result of an accident in which all of the passengers were killed in a crash of the aircraft, whether the proceeds paid to the decedent's wife who was named as beneficiary in the accident policies and whom as we contend, was also a purchaser and owner of the (4) policies, whether or not the proceeds were includable for tax purposes.

It is the petitioner's contention that the policies having been taken out by the decedent's wife, paid for by her, [fol. 12] possession of the policies having been by her, all in accordance with the intention and the agreement of her husband and herself that she should be the owner and have all of the rights under the policy, that under those circumstances, there were no so-called incidents of ownership which are part of the ordinary life insurance policies, and that even if these policies might be equated to life insurance policies, that under those circumstances, the decedent had no incidents of ownership under the proceeds and were not includable.

We contend further that the printed provision of the policies which by their terms reserved the right in the insured to change the beneficiary and for benefits with respect to injuries to the decedent did not repose, those right did not repose in the decedent for the basic reason that it was contrary to his beneficiary and agreement, that he was never asked or acquiesced or authorized that those provisions be inserted and that as a matter of fact there was no way that he had of deleting those provisions at the time of the purchase at the airport from one of the

booths which was installed and operated for that purpose; that in any event, the so-called right to change the beneficiary, for example, was an (5) illusory right and completely of no substance within the meaning of the case because the change could not be affective.

The policies themselves provide that changes may only be affected by the approval of an exclusive officer of the insurers and that the policies would have to be endorsed or endorsement attached and that the insured was physically unable to do that at any time.

First, because the airline flight was a single flight and return and secondly, he did not have the possession of the policies which was a requisite to the policies in order to make those changes.

[fol. 13] The Court: Did these policies cover a one way flight or a round trip?

Mr. Ball: These policies covered a round trip. They included a return. There was a check mark alongside the return.

So, it is our contention that the so-called rights, whatever they may have been under the printed provision, were illusory and ineffective and therefore cannot be considered incidents. I point out to your Honor that even if the insured had time to try to affectuate a change of beneficiary that could not be accomplished because of the fact that the policies were under our contention owned by the wife and that therefore, she could affectively block any change.

As a matter of fact, it is our position that she (6) could have gone into equity to restrain any attempt to block those, that sort of action.

And finally, we are going to suggest to your Honor that there is a basic difference between the accident coverage involved in these policies and life insurance in the general sense of life insurance. First of all, there is no requirement of the underwriting concepts or requirements which are applicable to life insurance. Under life insurance, not only is there a cash value and a surrender value—not only are the underwriting concepts based on the age of the insured, based on his occupation, based on his moral status in the community, and many other things involving underwriting, whereas in these policies of accident, none of those things are of any importance at all.

Actually there is a difference in concept because in an accident policy, the contingency is the accident and it makes no difference whether the insured dies or does not die [fol. 14], if there is no accident. So that the contingency is accident and incidents is that of death whereas under a life insurance policy, the contingency is the death and the accident might be incidental.

I suggest to your Honor that there is a fundamental difference and that we are intending that this coverage was not life insurance within the meaning of the provision of the code.

The Court: The Government's case depends upon this (7) being pre-death life insurance.

Mr. Ball: I think so, your Honor.

The Court: So you feel that if a passenger who had taken out a policy such as this had died of a heart attack in mid air, the policy would not cover him?

Mr. Ball: There would be no recovery whereas under any life insurance policy as such, there would be recovery and the provision of the code with respect to the includability of life insurance proceeds are an exception to the general rule that only the actual assets of the decedent's estate are includable. And when the code talks about life insurance, I suggest that it is life insurance in the regular meaning of that term.

The Court: I don't know whether you can make anything out of it or not but both companies are called casualty companies rather than life insurance companies.

Mr. Ball: That is correct, sir. We expect to show in the evidence that they had no authority to write life and that sort of thing.

Mr. Squire: If your Honor please, it is the respondent's position that the two aircraft accident insurance policies in question were issued to Mr. Noel, the decedent, that he did not assign the policies to a wife, nor did he transfer all of the incidents of ownership in the policy to his wife, [fol. 15] but that if the Court should hold that he did (8) transfer all of the incidents of ownership to his wife, then it is respondent's position that such transfer was revocable and it is also respondent's position in this case that such transfer was a gift in contemplation of death.

That concludes respondent's opening statement.
Mr. Ball: Mr. Fohl, please.

RICHARD G. FOHL, was called as a witness on behalf of the petitioner, and having been first duly sworn, testified as follows:

The Clerk: Would you state your name and your home address.
The Witness: The name is Richard G. Fohl. The home address is Hemlock Drive, Brookville, Long Island, New York.
The Clerk: That was Richard G.?
The Witness: G.

Direct examination.

By Mr. Ball:

Q. What is your occupation?
A. I am President of Airport Sales Corporation.
Q. And how long have you been connected with that company?
A. Thirteen years.
Q. And what does that company do?
A. We specialize in the sale of air travel accident insurance.
(9) Q. And you are also familiar with ordinary life insurance policies in the general sense of that term?
A. Yes.
[fol. 16] Now, Mr. Fohl, what connection did your company have with the issuance of the accident policies in this case?
A. Are you speaking of both policies; the one by the Fidelity and Casualty as well as the Continental Casualty?
Q. You are familiar with the accident policies involved here, one by the Continental and one with the Fidelity?
A. Yes.
Q. All right.
Will you state whether or not your company had anything to do with the issuance of the Continental policy?

A. Yes, we were the agent.

Q. And what about the Fidelity?

A. The same is true there.

Q. And where did you conduct your business?

A. In connection——

Q. In the sale of this kind of coverage?

A. Well, we are represented all over the country, both through booths which are staffed by persons and sell what we call personalized insurance, and then insurance vending machines.

Q. Now, the policies in question were taken out at a booth, were they not?

(10) A. That's correct.

Q. And can you tell us whether or not there was any machinery set up at that booth for the change of any of the policy provisions?

A. There was not.

Q. Now, can you tell us whether or not the clerks who were authorized to issue these contracts were required to ask the applicant whether or not he desired a reservation to change the beneficiary?

A. There was no such provision.

Q. Now, can you tell us approximately how many policies of this kind are issued domestically every year?

A. On the average, approximately about between seven and eight million.

Q. And are these policies known as single trip policies?

A. Well, more specifically we refer to them as a specific trip policy as opposed to a short term *on* annual policy.

[fol. 17] Q. Are you able to state whether or not there was any appreciable number of changes in the beneficiaries on these policies after they were issued?

A. With regards to the specific trip policy, the requests were very, very infrequent.

Q. Well, when you say, "very, very infrequent," are you talking about less than a hundred, less than ten, less than five? If it is possible, we would like to get a general idea (11) of what actually happens in these situations?

A. I would say they were less than ten and I know of no specific instances that I can remember of any names or anything of that nature.

Q. Are you talking about the time period for that num-

ber of ten, is the year 1956 or 1956 up to date, or just what period are you talking about?

A. I am talking about—in that regards to my over all experience in the field.

Q. And that would be over 13 years?

A. Yes, sir.

Q. Now, can you state, to your knowledge, whether or not the Continental was authorized, and I am now talking about the company which issued the policy in this case, was authorized to write life insurance?

A. The Continental Casualty Company is not authorized to issue life insurance.

Q. Now, what about the Fidelity Casualty Company of New York; is that authorized to is-ue life insurance?

A. To the best of my knowledge, no.

Q. Can you tell us whether these policies are subject to approval by any insurance commission?

A. Yes, sir.

Q. And can you tell us whether or not they are approved as a form of accident coverage?

(12) A. Yes, they are considered accident and health coverage.

Q. Now, would you be good enough to tell us very briefly what are the basic differences between life insurance and this kind of coverage with respect to the requirements, the underwriting concepts and requirements and so forth?

A. Well, the major differences, of course, is in connec-

[fol. 18] tion with life insurance. This can be related to any and all types of death regardless of cause, natural act or what have you. In the case of an accident policy, the death must be caused by accident and in this particular instance, it is even more limited. It must be caused by a specific type of accident which is an aircraft accident.

Q. Can you tell us whether or not the health factor of an applicant is important in life insurance?

A. Yes.

Q. Is it important or requisite of any kind in connection with this accident coverage?

A. Not this type of accident coverage, no.

Q. What about the occupation of an applicant; is that important in life insurance?

A. Yes.

Q. Is it of any importance or subject of any requirement in this accident type of policy?

A. No, it is not.

(13) Q. What about the moral status of an applicant for insurance? Is that necessary or important in a life policy?

A. It is considered important, yes,

Q. What about an accident coverage?

A. No.

Q. Now, are you able to state whether in the insurance industry that this kind of accident coverage is called or considered life insurance?

A. I am relatively sure that it is not considered life insurance by the industry and most specifically not by Continental or myself.

Q. Do you know in your experience whether or not life insurance is used extensively in estate planning?

A. From various literature that I have read, yes.

Q. And to your knowledge, does this accident coverage ever figure in the estate planning?

A. Not this type.

Q. Now, to your knowledge, Mr. Fohl, was it possible with respect to these policies to effect a change of beneficiary without the endorsement of the policy?

A. No, it would have to be endorsed.

Mr. Ball: I suppose we can agree that the precise provisions are contained in both policies?

[fol. 19] Mr. Squire: I don't know what you mean by that but I would think as far as the policy says, it speaks for itself.

(14) By Mr. Ball:

Q. Do these policies contain standard provisions?

A. Yes.

Q. And as approved by an Insurance Commissioner?

A. Yes.

Mr. Ball: Cross-examination.

Before you begin, may I indulge to ask one more question?

The Court: Yes.

By Mr. Ball:

Q. To your knowledge, Mr. Fohl, on June 19, 1956, was any executive of either Continental or Fidelity present at the International Airport?

A. Not to my knowledge.

Mr. Ball: All right.

Cross-examination.

By Mr. Squire:

Q. Are you a member of an actuary society, Mr. Fohl?

A. No, sir.

Q. Do you hold any degree as an actuary?

A. No.

Mr. Squire: No further questions.

The Court: Do you have any redirect of the witness?

Mr. Ball: No, sir.

The Court: You may step down.

(15) (Witness excused.)

Mr. Ball: Mrs. Noel, please.

[fol. 20] Ruth Noel was called as a witness on behalf of the petitioner, and, having been first duly sworn, testified as follows:

The Clerk: Would you state your name and your home address, please.

The Witness: Ruth Noel, 286 Mountain Avenue, Ridgewood, New Jersey.

The Clerk: Thank you.

Direct examination.

By Mr. Ball:

Q. Mrs. Noel, you are the widow of Marshal L. Noel?

A. I am.

Q. And you are co-executrix of his estate?

A. Yes.

Q. And you resided with your husband prior to his death in Ridgewood, New Jersey?

A Yes.

Q. And you still reside in Ridgewood, New Jersey?

A. I do.

Q. It has been stipulated that your husband was killed in an airplane crash on June 20, 1956. How old was your husband in 1956?

A. He was 49.

(16) Q. And will you state the names of yours and his children and their ages at that time, that is in 1956?

A. Well, there was Patricia, 19; Sharon, 17; and Marsha, 10.

Q. Now, what business was your husband in at that time?

A. Well, he was Vice-President and part owner of Maquinarias Bolivar.

Q. And was that a Venezuela company, to your knowledge?

A. That's right, it was.

Q. And was company business, to your knowledge, the reason for his trip?

A. Yes.

Q. What kind of business did that company do?

A. Well, it sold heavy machinery, road building and mining.

Q. And do you know what your husband was going down specifically for?. I think you said he went down for the [fol. 21] business of the company.

A. That's right, to fulfill orders and just to take care of his business.

Q. What was the condition of your husband's health?

A. It was very good.

Q. And what about his disposition?

A. That was equally good.

Q. Can you tell us about his ambition or plans for the (17) future, if you know?

A. Well, of course, he had a great many plans for the future. In so far as he had started the business in Venezuela, he had business in Texas. He was going back and forth constantly, taking care of all of them, doing his best to get more business.

Q. Was he a devoted husband and father?

A. Yes, he was.

Q. Now, on the evening of June 19, 1956, you and your husband drove to the airport, had you not?

A. That's right, yes, we did.

Q. Now, who drove the car?

A. I did.

Q. And can you tell us whether or not you remained with him until the ill-fated plane took off?

A. I did.

Q. And it has been stipulated that the plane took off about 10:16 and crashed about two hours later. Did you leave for home after the plane took off?

A. Yes, I did.

Q. And that was immediately?

A. Yes.

Q. Now, Mrs. Noel, I show you photostats of the policies which were referred to here.

(The documents were shown to the witness.)

(18) The Court: Are those copies of Exhibit 1-A and 2-B?

Mr. Ball: Yes, your Honor.

By Mr. Ball:

Q. And I ask you whether you were present when these polices were taken out?

A. Yes, I was.

[fol. 22] Q. And where were they taken out?

A. They were taken out at the Idlewild National Airport.

Q. Who took out those policies?

A. I did.

Q. And did you see Marshal fill in the blanks——

A. Yes, I did.

Q. (Continuing)—on these policies?

A. Yes.

Q. And who paid for them?

A. I did.

Q. Now, were the policies issued right then and there?

A. Yes.

Q. And what happened to them physically?

A. Well, he signed them and then they had to be given back to the clerk, I think, for some sort of stamping and then he told— I don't remember whether the clerk was a man or woman— he told them to give them to me as they now belonged(19) to me and he had nothing more to do with them.

Q. And did you at that time get the policies physically?

A. Yes, I did.

Q. And did you take the policies home with you?

A. Yes.

Q. And were they or were they not in your possession until——

A. They were.

Q. (Continuing) —until after today?

A. They were.

Q. Now, at the counter, did you—or prior to that time, did you have any further discussion or conversation with Marshal about these policies?

A. Well, it was just that I had asked him to have them taken out, that he was doing an awful lot of air traveling and I was a little worried about it and if anything happened, we would be protected.

Q. Now, did he make any statement at the time that the policies were handed over to you with respect to whether or not you owned the policies?

A. Oh, yes, as I said, he said that, give them to my wife. They are hers now, I no longer have anything to do with them.

Q. Following the death of your husband, you eventually (20) collected on these policies, did you not?

A. Yes, I did.

[fol. 23] Mr. Ball: Cross-examination.

Mr. Squire: May I have a moment, you Honor?

The Court: Yes.

Cross-Examination.

By Mr. Squire:

Q. Now, Mrs. Noel, did you state on direct examination when you were married to Mr. Noel?

A. I don't beleive so.

Q. Would you please state it now?
A. Yes. I was married August 27, 1932.
Q. And you are a co-executor of his estate?
A. Yes.
Q. And as co-executor, you were one of the people who signed the Estate Tax Return which was filed with the United States?
A. I believe so.
Q. And with the Estate Tax Return, there was filed a copy of Mr. Noel's Will?
A. Yes.
Q. Do you recall when that Will was made out?
A. No, I do not.
Q. Well, if I showed you a copy of the Will, would that help to refresh your memory?

(21) Mr. Squire: Do you want to see it?
Mr. Ball: Yes.

(The document was shown to Mr. Ball and to the witness.)

Mr. Squire: You may take your time to look at it.
The Witness: All right. Thank you.

By Mr. Squire:

Q. Can you tell from that copy the date of the Will?
A. Yes, I can.
Q. What was that date?
A. September 18, 1948.
Q. Thank you.
And you were the sole beneficiary of Mr. Noel's under that Will, were you not?
A. Yes.

[fol. 24] Q. You mentioned in answer to a question by Mr. Ball that your husband was a Vice-President and part owner of a Venezulean company?
A. That's right.
Q. Now, in 1956 did he have any other business interests?
A. Yes, he did.
Q. Can you name some of them?
A. Well, he owned a company down in Bay City, Texas

and was connected with Frantz Tractor Company in New York.

Q. Do you know what this company in Bay City which he (22) owned, do you know what this company did?

A. Yes, it was a land clearing organization.

Q. And what was the other company that you said that he—Frantz Tractor Company—was he an officer of that company?

A. I don't remember whether he was still an officer. I believe he was but I am not sure. I wouldn't be positive about it.

Q. All right——

The Clerk: Respondent's Exhibit G marked for identification.

(The document referred to was marked for identification as Respondent's Exhibit No. G.)

By Mr. Squire:

Q. Mrs. Noel, after the airplane accident, you did file an Income Tax Return for the year 1955 for yourself and for Mr. Noel?

Mr. Ball: May I see it?

Mr. Squire: After she identifies it.

By Mr. Squire:

Q. I show you Respondent's Exhibit G, and ask you if this is a copy of that Return?

[fol. 25] (The document was shown to the witness.)

A. Yes, I think it is. Yes.

Q. Thank you.

(23) Now, the 1955 Return shows wages or salary income of $10,000 from a company called the Equipment Investors, Incorporated, New York City. Do you know anything about that company?

A. Yes, I do. I had forgotten about it when I mentioned the others.

Q. And was Mr. Noel an officer of that company?

A. Yes, he was.

Q. And do you know what the business of that company was?

A. Well, a financial business.

Q. Financial?

A. Any further explanation of it I don't believe I could make right at this time.

Mr. Squire: I offer in evidence Respondent's Exhibit G.

Mr. Ball: I object to it, sir. It appears to be Income Tax Return of the decedent and his wife for the year 1955 which precedes by a considerable period of time any of the matters involved in this case and I therefore see no relevance to it and object on that ground.

Mr. Squire: If that is the reason Mr. Ball gives for objecting to the exhibit, the exhibit shows that it was filed, it was signed by Mrs. Noel on October 15, 1956, after the date of the accident, and was filed on that date.

(24) The Court: What is the purpose of the exhibit?

Mr. Squire: The purpose of the exhibit is to give the Court an idea of Mr. Noel's business activities in order to show that he appears to have been well versed in business transactions.

Mr. Ball: I will admit to that, sir.

The Court: I will receive the exhibit.

[fol. 26] The Clerk: That is Respondent's G.

(The document previously marked for identification as Respondent's Exhibit G was received in evidence.)

By Mr. Squire:

Q. Mrs. Noel, I would like you to please try to recall the period about—around the time of this last airplane trip. You said that it was on company business.

How long had Mr. Noel been planning this trip?

A. Well, that would be very difficult to say. He made so many trips. He made one or two a month back and forth to Venezuela.

Q. Do you recall how long he was home before he made this last trip?

A. Probably a month.

Q. Do you recall whether the trip was one which he had to take on very short notice?

A. No.

(25) Q. It was not?

A. No.

Q. Now, you were the beneficiary of the two policies in question?

A. Yes, I was.

Q. Mr. Noel had other policies of life insurance on his life to which you were the beneficiary?

A. Yes.

Q. Were you the owner of any of these other policies?

A. No, I was not.

Q. Did you pay the premium on any of these other policies?

A. No, I didn't.

Q. Now, one of the policies under which Mr. Noel was insured was a Maryland Casualty Company aviation accident policy in which you were the beneficiary and in which the face amount was $50,000. Is that correct?

A. That's right.

Q. When you submitted a claim for the proceeds of that policy, you furnished the policy to the company, did you not?

A. Yes.

Mr. Squire: May I have this marked for identification? [fol. 27] The Clerk: Respondent's Exhibit H marked for identification.

(26) (The document referred to was marked Respondent's Exhibit H for identification.)

By Mr. Squire:

Q. Mrs. Noel, I show you Respondent's Exhibit H and ask you whether that is the Maryland Casualty Company policy under which you received $50,000 as beneficiary?

A. Yes, sir, it is.

Q. Thank you.

Mr. Squire: Did you want to see it?

Mr. Ball: Yes.

(The document was handed to Mr. Ball.)

Mr. Squire: I offer in evidence Respondent's Exhibit H.

Mr. Ball: I object to it, sir. This policy is not involved

in the instant proceeding. That policy was—the proceeds of that policy were returned for tax purposes and have not been questioned.

The Court: What is the purpose of the offer?

Mr. Squire: The purpose of this offer is to show that the decedent owned an aviation accident policy which was not a trip policy but a term policy which the ownership of which he did not transfer to Mrs. Noel.

The Court: Why is that relevant here?

Mr. Squire: Because, your Honor, one view of the issue in the case is whether Mr. Noel assigned the two (27) policies in question to Mrs. Noel. The only evidence of whether he may have done so is Mrs. Noel's oral testimony. She is the sole witness to what happened at that [fol. 28] airport. She is an interested witness, as well. It seems logical to respondent, your Honor, that if Mr. Noel had shown some conduct consistent with that, that would be some evidence to corroborate Mrs. Noel.

Ordinarily we can show—we show many instances of inconsistent evidence with that, and we think that is some evidence to show that he did not make the assignment and he did not state the words that Mrs. Noel says he did.

The Court: I will admit the exhibit merely to round out the picture.

Mr. Ball: All right. May I suggest to your Honor then that we add to the record, without devoting any more time than is necessary to it, such other records as are in court with respect to that policy because I think basically that policy was taken out by a company with which Mr. Noel was associated and—

The Court: You may on direct or through other witnesses present to the Court such evidence as you think will further complete the picture.

Mr. Ball: Thank you, sir.

The Court: I might inquire of you at this point though, whether in your view of the concept of life insurance, (28) whether the proceeds of this policy, that is the Maryland Casualty policy should have not similarly be excluded from the gross estate. To be sure, it is quite a different kind of a casualty policy but in view of your contention with respect to the nature of life insurance, I wonder where this policy fits into the picture.

Mr. Ball: Well, that policy is a little bit different from the policies involved in the matter before your Honor in that it is a loan return policy and longer term policy and therefore the possibility of creating a change during the [fol. 29] term of the policy is more of a practical consideration—

The Court: Don't let me interrupt you. I am not inquiring with respect to the power of the change of the beneficiaries, I am inquiring as to the nature of the insurance itself, whether it is life insurance on the one hand or some other kind of insurance in the other hand.

Directing yourself to that limited question, how does this Maryland Casualty Company policy differ from these others?

Mr. Ball: I think it is easily allied with it and probably the same principle should apply.

The Court: This may not be the point to comment upon it but I hope both counsel on brief will give me whatever rulings or decisions there have been with respect to (29) whether accident insurance may under certain circumstances be treated as life insurance.

Mr. Ball: I should like to develop that before your Honor as much as possible. As a matter of fact, I think there is just one case—

The Court: Well, this is a matter for briefs and just make sure that it is covered.

Mr. Ball: I am glad your Honor is interested in the problem.

By Mr. Squire:

Q. Now, Mrs. Noel, with respect to the two policies in question, after you were told about the accident, some time after that, you made claims under these policies, did you not?

A. Yes, I did.

The Clerk: Respondent's Exhibit I and Exhibit J marked for identification.

[fol. 30] (The documents referred to were marked for identification as Respondent's Exhibit I and J.)

By Mr. Squire:

Q. Now Mrs. Noel, I show you respondent's Exhibit I and ask you whether this is a copy of the Claim Form you filed with the Continental Casualty Company for the proceeds of the policy issued by that company?

(The document was shown to the witness.)

A. Yes, it is.

(30) Mr. Squire: I offer in evidence Respondent's Exhibit I.

The Court: It may be admitted.

(The document previously marked for identification as Respondent's Exhibit I was received in evidence.)

By Mr. Squire:

Q. Mrs. Noel, I show you Respondent's Exhibit J, and ask you whether this is a copy of the Claim form you filed with the Fidelity and Casualty Company of New York for the proceeds of the policy issued by that company?

(The document was shown to the witness.)

A. It is, yes.

Mr. Squire: I offer in evidence Respondent's Exhibit J.

The Court: Admitted.

(The document previously marked for identification as Respondent's Exhibit J was received in evidence.)

[fol. 31] By Mr. Squire:

Q. Now Mrs. Noel, you stated before that it was you who paid the premiums on the two policies in question. Did you also purchase Mr. Noel's airplane ticket?

A. No, I did not.

Q. How did it happen that it was you who paid the (31) premiums on these policies?

A. Just one of those things. I always did it every time he took out insurance, the airport insurance, I did.

Mr. Squire: I have no further questions of Mrs. Noel.

Redirect Examination.

By Mr. Ball:

Q. Mrs. Noel, to your knowledge, did or did not your husband have an air credit card with the airlines?

A. Yes, he did.

Q. Do you know whether that happened to be a personal card or company card? Do you happen to know that?

A. I don't know, no.

Q. Now, Exhibits I and J, which have been shown you and which you identified as containing your signature, can you tell us where and who prepared these forms for you?

A. Well, I think my attorneys did them.

Q. And your attorney is——

A. Yourself, Mr. Harry Ball and Mr. Merrey, Jr.

Q. And would you recall whether or not these were prepared up in New Jersey?

A. I believe they were prepared in New Jersey.

Q. Now, you were questioned about a Maryland Casualty policy. Would you know whether or not that policy was issued in connection with aviation policies issued for the employees (32) of the Frantz Company?

A. I believe it was. I wouldn't be too sure.

Mr. Ball: No further questions.

[fol. 32] Recross-Examination.

By Mr. Squire:

Q. Mrs. Noel, just a moment or two ago you referred to a Mr. Merrey?

A. That's right.

Q. How is that spelled?

A. M-e-r-r-e-y.

Q. And is that Mr. Merrey present in the courtroom?

A. Yes, he is.

Mr. Squire: I have no further questions.

(Witness excused.)

Mr. Ball: Will your Honor indulge me for just one moment? We may be able to stipulate with respect to this matter.

(Mr. Ball and Mr. Squire consult.)

Mr. Ball: I think we can save a few minutes, if your Honor please, by putting something on the record.

I proposed to request a stipulation from the Government—

The Court: Have you agreed upon a stipulation between yourselves?

Mr. Ball: Yes, I think we have, sir but——

(33) The Court: I just don't want you negotiating on the record. May your agreements between yourselves off the record and then you may come back on the record and state for the Court what you have agreed.

Mr. Ball: Well, I think we have agreed. I will put it this way: It is stipulated that the Maryland Casualty Company policy, copy of which has been offered in evidence, was issued as part of a group passenger accident air insurer. II, renewal order, made by a corporation designated as an employer, namely, Frantz Equipment Company, covering employees, a group of employees which included the decedent, Marshal L. Noel.

[fol. 33] Mr. Squire: Except for the fact that the policy was an original policy, I will so stipulate.

The Court: Very well.

Mr. Ball: And Mr. Squires wishes me to stipulate that the parties have further agreed to stipulate for the best of the Court, should question arise to the Court, that the Maryland Casualty Company policy on its face does not appear to extend to the date of this accident but there was a renewal of that particular policy which caused it to extend and to cover the date of this accident.

Now, if your Honor will indulge me for just one moment, I will——

My I recall Mr. Fohl for just a moment?

(34) The Court: You may.

RICHARD G. FOHL was recalled as a witness on behalf of the petitioner, and having been previously duly sworn, testified as follows:

Redirect Examination.

By Mr. Ball:

Q. Mr. Fohl, Mr. Squires referred a few minutes ago to an assignment of policies of this kind and I ask you whether on June 19, 1956 at the International Airport there were any forms of any kind which were available for making assignments of the accident coverage?

A. No, there were no forms available for that purpose.

Q. Can you tell us when forms of that kind did become available for general use? What year?

A. This year.

Mr. Ball: That's is all.

Mr. Squire: I have no cross-examination, your Honor.

[fol. 34] COLLOQUY

Mr. Ball: We rest, sir.

Mr. Squire. May I have a short recess, you Honor?

The Court: Very well. Off the record.

(A short recess was taken.)

The Court: On the record.

Mr. Ball: May it please your Honor, during the (35) recess we have found in the files of United States Aviation Underwriters, Inc., which caused the issuance of that Maryland policy in the record, we have found the original application of the employer and the specific application involving Mr. Noel's policy and I should like to leave, if your Honor will permit, to add these to the record and if your Honor grants that leave, then I should like leave to withdraw these originals and substitute photostats so that I can give the originals back to Mr. Gallagher.

The Court: Well, I think there are too many photostats already. I would prefer to have the originals remain in the record.

Is counsel aware upon the conclusion of the litigation

that the exhibits may be withdrawn under the rules of the Court?

Mr. Ball: Excuse me, your Honor.

Is that satisfactory to you, Mr. Gallagher?

Mr. Gallagher: Yes, sir, it is agreeable to me.

The Court: The Clerk may staple them and receive them as a single exhibit.

The Clerk: It will be Petitioner's Exhibit Number 3.

(The document referred to was marked for identification as Petitioner's Exhibit No. 3 and was received in evidence.)

[fol. 35] Mr. Squire: I have no objection, your Honor.

And the Government has no further evidence to (36) introduce, your Honor.

Mr. Ball: That is it, sir.

The Court: Will you gentlemen approach the bench?

(Bench conference.)

The Court: Opening briefs in 45 days. Reply briefs in 15 days.

The Clerk: 45 days for the original briefs will be due March 23, 15 days thereafter the reply will be due April 9.

The Court: The Court is adjourned.

(Whereupon, at 4:10 p.m., the trial in the above-entitled matter was adjourned.)

[fol. 36] BEFORE THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM EXHIBIT 1-A (APPLICATION OF INSURANCE AND POLICY OF INSURANCE OF CONTINENTIAL CASUALTY COMPANY)

[fol. 37]

APPLICATION FOR INSURANCE
MUST BE COMPLETED AT TIME OF PURCHASE

NAME OF INSURED	MARSHAL L. NOEL	
ADDRESS OF INSURED — Street	316 GREENWAY ROAD	
City	RIDGEWOOD	
State	N.J	
NAME OF BENEFICIARY	MRS ML NOEL (RUTH)	RELATIONSHIP TO INSURED: WIFE
Flight destination	PORT-DRDAZ, VZ.	And return flight ☑
Signature of Applicant (Applicant must sign his or her name)	Marshal Noel	

SCHEDULE

Principal Sum $62,500 — Premium $2.50

Date and hour of inception JUN 19 10 08 PM '56

Zone of Flight

Countersigned Resident Agent

Point of departure

UPC 190 23256

CONTINENTAL CASUALTY COMPANY

General Offices: Chicago, Illinois

A STOCK COMPANY • HEREIN CALLED THE COMPANY

HEREBY INSURES the person named in the first line of the application (herein called the Insured) and subject to the exceptions, limitations and provisions of this policy, promises to pay for loss resulting from injury; to the extent herein limited and provided. "Injury" wherever used in this policy means bodily injury caused by an accident occurring while this policy is in force and resulting directly and independently of all other causes in loss covered by this policy and sustained during the first one way flight or return flight described in the Schedule occurring on or after the inception date and hour shown in the Schedule; provided such injury is sustained in consequence of (a) riding as a passenger in, boarding, alighting from or being struck by an aircraft operated on a regular, special or charter flight by (1) a scheduled airline of

XXX

Part 1. POLICY PROVISIONS. ENTIRE CONTRACT; CHANGES: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

XXX

CHANGE OF BENEFICIARY: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

XXX

CONFORMITY WITH STATE STATUTES: Any Provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

IN WITNESS WHEREOF, the Continental Casualty Company has caused this policy to be signed by its President and Secretary; but the same shall not be binding upon the Company until countersigned by its duly authorized agent.

Thos. R. Sears

Paul ...

NAME OF INSURED	MARSHALL L. NOEL	
ADDRESS OF INSURED — Street	316 GREENWAY ROAD	
City	RIDGEWOOD	
State	N.J.	
NAME OF BENEFICIARY	MRS ML NOEL (RUTH)	RELATIONSHIP TO INSURED: WIFE
Flight destination	PORT-DRDAZ, VZ.	And return flight ☑
Signature of Applicant (Applicant must sign his or her name)	Marshall Noel	

Point of departure

Countersigned Resident Agent

Date and hour of inception JUN 19 10 08 PM '56

Principal Sum $62,500 — Zone of Flight — Premium $2.50

19023256

CONTINENTAL CASUALTY COMPANY

General Office: Chicago, Illinois

A STOCK COMPANY • HEREIN CALLED THE COMPANY

HEREBY INSURES the person named in the first line of the application (herein called the Insured) and subject to the exceptions, limitations and provisions of this policy, promises to pay for loss resulting from injury; to the extent herein limited and provided. "Injury" wherever used in this policy means bodily injury caused by an accident occurring while this policy is in force and resulting directly and independently of all other causes in loss covered by this policy and sustained during the first one way flight or return flight described in the Schedule occurring on or after the inception date and hour shown in the Schedule; provided such injury is sustained in consequence of (a) riding as a passenger in, boarding, alighting from or being struck by an aircraft operated on a regular, special or charter flight by (1) a scheduled airline of

XXX

Part 2. POLICY PROVISIONS. ENTIRE CONTRACT; CHANGES. This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

XXX

CHANGE OF BENEFICIARY: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

XXX

CONFORMITY WITH STATE STATUTES: Any Provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

IN WITNESS WHEREOF, the Continental Casualty Company has caused this policy to be signed by its President and Secretary; but the same shall not be binding upon the Company until countersigned by its duly authorized agent.

John A. Henry
Secretary

Ray Trautman
President.

Printed in U.S.A.

[fol. 38] BEFORE THE TAX COURT OF THE UNITED STATES

EXCERPTS FROM EXHIBIT 2-B (APPLICATION FOR INSURANCE AND POLICY OF INSURANCE OF THE FIDELITY AND CASUALTY COMPANY OF NEW YORK).

[fol. 39]

ASSOCIATED AVIATION Underwriters

No 643984

90 John Street, New York 38, New York

DO NOT PURCHASE MORE THAN A TOTAL OF $62,500 PRINCIPAL SUM—NOR FOR TRAVEL ON OTHER THAN SCHEDULED AIR CARRIERS. THIS POLICY COVERS ON ONE-WAY TRIP ONLY UNLESS ROUND TRIP TICKET IS PURCHASED BEFORE DEPARTURE.

I hereby apply to Company named below for Scheduled Air Carrier Trip (Airline Trip) Insurance to insure me on one airline trip as follows:

Name of Applicant (Please Print): MARSHAL L. NOEL			
Beneficiary: Name RUTH NOEL		Street Address 316 Greenwald Rd	
Beneficiary: City Ridgewood		State NJ	
Point of Departure: New York	Destination: Port Orta	Trip to Be Made On: ☐ One-Way ☑ Round Trip Ticket	
Date 6-19-1956	Principal Sum $62,500.	Premium $2.50	Personal Signature of Applicant: Marshal L Noel

Countersigned By Resident Agent: Richard D. Foth Per _____

The Fidelity and Casualty Company of New York

(A Stock Company, hereinafter called the "Company")

In consideration of the payment of the premium and subject to the exceptions, limitations, reductions and other provisions of this policy, hereby insures the person whose name appears above as Applicant, hereinafter called the Insured, as follows:

1. INSURING CLAUSE: Ticket or Pass Requirement. The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round airline trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a scheduled air carrier.

XXX

2. POLICY PROVISIONS. Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

XXX

Change of Beneficiary: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

XXX

Conformity with State Statutes: Any provision of this policy which, on its effective date, is in conflict with the statutes of the State in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

IN WITNESS WHEREOF, the Company has caused this policy to be signed by its President and Secretary and countersigned by its duly authorized agent, but it shall not be binding upon the Company

follows:

Name of Applicant (Please Print): MARSHAL L. NOEL			
Beneficiary: Name RUTH NOEL		Street Address 316 Grogan Way Rd	
City Ridgewood		State NJ	
Point of Departure: New York	Destination Port Orta		Trip to Be Made On ☐ One-Way ☑ Round Trip Ticket
Date 6-19-1956	Principal Sum $2,500.	Premium $2.50	Personal Signature of Applicant: Marshal L Noel

Countersigned by Resident Agent: Richard S. Johns Per _____

The Fidelity and Casualty Company of New York

(A Stock Company, hereinafter called the "Company")

In consideration of the payment of the premium and subject to the exceptions, limitations, reductions and other provisions of this policy, hereby insures the person whose name appears above as Applicant, hereinafter called the Insured, as follows:

1. INSURING CLAUSE: Ticket or Pass Requirement. The Company will pay the benefits specified below if during the term of this policy the Insured suffers loss resulting directly and independently of all other causes from accidental bodily injury (hereinafter referred to as "such injury"), sustained under circumstances specified below during the first one-way or round airline trip taken by the Insured after the purchase of this policy on Aircraft Operated by a Scheduled Air Carrier as defined below from the Point of Departure to the Destination, both shown above, and return if round trip ticket is obtained before departure, provided that at the time that the Insured sustains such injury he is traveling on a transportation ticket or pass covering the whole of said airline trip, issued to him for transportation on an aircraft operated by a scheduled air carrier.

XXX

2. POLICY PROVISIONS. Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached hereto. No agent has authority to change this policy or to waive any of its provisions.

XXX

Change of Beneficiary: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

XXX

Conformity with State Statutes: Any provision of this policy which, on its effective date, is in conflict with the statutes of the State in which the Insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

IN WITNESS WHEREOF, the Company has caused this policy to be signed by its President and Secretary and countersigned by its duly authorized agent, but it shall not be binding upon the Company unless the application is signed personally by the Applicant.

Secretary _____ President _____

[fol. 40] BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90028

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

DECISION AND JUDGMENT—Entered January 8, 1963

Pursuant to the opinion of the Court filed November 28, 1962, and the agreed computation of tax liability filed by the parties; and incorporating herein the facts recited in the computation as the findings of the Court, it is

ORDERED AND DECIDED: That there is a deficiency in estate tax due from the petitioners in the amount of $14,040.16.

s/ Arnold Raum, Judge.

* * * * * * *

It is hereby stipulated that the foregoing decision is in accordance with the opinion of the Court and the agreed computation of the parties, and that the Court may enter this decision, without prejudice to the right of either party [fol. 41] to contest the correctness of the decision entered herein, pursuant to the statute in such cases made and provided.

It is further stipulated that the petitioners may claim credit for State estate, inheritance, legacy or succession taxes, and may present to the Internal Revenue Service proof of such payment within the statutory period.

Edward F. Merrey, Jr., Counsel for Petitioners, Harry Norman Ball, Counsel for Petitioners, Crane C. Hauser, Chief Counsel, Internal Revenue Service.

* * * * * * *

(Computation figures, etc., annexed, are omitted.)

BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90028.

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

39 T. C. No. 44

FINDINGS OF FACT AND OPINION—Filed November 28, 1962.

1. Proceeds of so-called flight or accident insurance paid to beneficiary upon death of airline passenger *held* in- [fol. 42] cludable in decedent's gross estate as "insurance under policies on the life of the decedent". Sec. 2042 (2), I.R.C. 1954. *Leopold Ackerman*, 15 B.T.A. 635, followed.

2. Decedent's right to change beneficiary in such policies *held* not destroyed by delivery of the policiesto beneficiary in the circumstances of this case; decedent had requisite incident of ownership within Section 2042(2).

Harry Norman Ball, Esq., and *Edward F. Merrey, Jr., Esq.*, for the petitioners.

Ibert Squire, Esq., for the respondent.

Respondent determined a deficiency in estate tax in the amount of $17,298.10.

The question for decision is whether respondent erred in including in the gross estate of Marshal L. Noel the amount of $125,000, which represented the proceeds of two policies of air travel accident insurance paid to his wife, the beneficiary named in the policies, after his death in an airplane accident.

FINDING OF FACT

Some of the facts have been stipulated, and, as stipulated, are incorporated herein by reference.

Marshal L. Noel, the decedent, died on June 20, 1956 when the airplane in which he was a passenger crashed into the Atlantic Ocean. The estate tax return was filed with the

district director of internal revenue for the district of Newark, New Jersey.

The decedent was 49 years old at his death and a resident of Ridgewood, New Jersey. He was employed in New [fol. 43] York City at substantial salaries by Frantz Tractor, Inc. and Equipment Investors, Inc. He was owner of Noel Company, a business in Bay City, Texas, that dealt in farm equipment and did land clearing on a contract basis. He was also vice president and part owner of a Venezuelan company, Maquinarias Bolivar, that sold heavy road building and mining machinery. He frequently made business trips to Venezuela. It was on such a trip that the airplane accident occurred which caused his death.

On the evening of June 19, 1956, decent's wife, Ruth M. Noel (hereinafter sometimes referred to as Ruth), drove her husband by automobile from their home in Ridgewood, New Jersey, to the New York International Airport (known as Idlewild) in New York, New York, where he was to board an airplane bound for Venezuela. At the airport, after purchasing his airplane ticket, decedent applied in writing for two policies of air travel accident insurance, each in the principal sum of $62,500, and each naming him as the person insured, at a booth maintained for the sale of such policies by Airport Sales Corporation, a sales agent. Decedent made separate written applications for each policy; one, for a policy in which Continental Casualty Company (hereinafter referred to as Continental) was the insurer; the other, for a policy in which The Fidelity and Casualty Company of New York (hereinafter referred to as Fidelity) was the insurer.

The last line of the application form for the Continental policy contained the printed words: "Signature of Applicant—(Applicant must sign his or her name)". Decedent signed his name on this line.

The application for the Fidelity policy contained the following printed statement immediately above the lines to be filled in by the applicant:

> [fol. 44] I hereby apply to Company named below for Scheduled Air Carrier Trip (Airline Trip) insurance to insure me on one airline trip follows:

The first line of this application contained the printed words: "Name of applicant (Please Print)", Decedent's name is printed by hand on this line. The last line of this application contained the printed words: "Personal Signature of Applicant". Decedent signed his name on this line

Both applications named Ruth as beneficiary and stated that the trip to be covered by the insurance was a round trip flight from New, York, New York, to Puerto Ordaz, Venezuela. The premium paid for each policy was $2.50. Ruth is the sole beneficiary of the decedent's estate.

After the applications were signed by decedent he gave them to the sales clerk who validated them. Upon decedent's instructions the clerk handed the policies to Ruth. She kept them in her custody until after her husband's death.

Each policy provided for payments by the insurer in specified amounts in respect of certain bodily injuries sustained by the insured as a result of an accident while a passenger on his round trip (either to or from Venezuela), and each policy also provided for payment of the principal sum ($62,500) in the event of loss of life in such accident.

Each policy contained the following provision entitled "Payment of Claims":

> Indemnity for loss of life will be payable in accordance with the beneficiary designation and the provisions respecting such payment may be prescribed herein and effective at the time of payment. If no such designation or provision is then effective, such indemnity shall be payable to the state of the Insured. Any [fol. 45] other accured indemnity unpaid at the Insured's death may, at the option of the Company, be paid either to such beneficiary or to such estate. All other indemnities will be payable to the Insured.

Each policy contained the following provisions:

> Policy Provisions. Entire Contract; Changes: This policy, including the endorsements and the attached papers, if any, constitutes the entire contract of insurance. No change in this policy shall be valid until approved by an executive officer of the Company and unless such approval be endorsed hereon or attached

hereto. No agent has authority to change this policy or to waive any of its provisions.

* * * * * * *

CHANGE OF BENEFICIARY: The right to change of beneficiary is reserved to the insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

* * * * * * *

CONFORMITY WITH STATE STATUTES: An Provision of this policy which, on its effective date, is in conflict with the statutes of the state in which the insured resides on such date is hereby amended to conform to the minimum requirements of such statutes.

The Continental policy contained the following provision:

[fol. 46] This policy takes effect on the inception date and hour stated in the Schedule and terminates upon completion of the one way flight or return flight described in the Schedule or twelve months after said inception date and hours, whichever occurs first, Standard Time at place of issue as to each date.

The Fidelity policy contained the following provision:

5. POLICY TERM. This insurance shall commence on the day and hour shown above and shall terminate either upon completion of the above described airline trip or upon expiration of or surrender for refund or credit of, the transportation ticket hereinbefore referred to, but in no event shall this insurance extend beyond a period of twelve months.

The decedent was not asked whether he wished to reserve the right to change the beneficiary, nor was there any procedure available at the insurance booth to change any provision of the policies. The clerk at the booth was not authorized to vary any of the terms of the policies.

After the purchase of the two insurance policies in question the decedent boarded an airplane bound for Caracas, Venezuela, on a regular scheduled non-stop flight. The airplane left New York International Airport at 10:16 p.m., E.S.T., on June 19, 1956. Ruth returned to her home with the policies.

Less than three hours later, at 12:31 a.m., E.S.T., on June 20, 1956, the airplane in which decedent was a passenger crashed into the Atlantic Ocean. All on board were killed.

On June 25, 1956 Ruth signed claim forms for the insurance payable under the two policies. The forms were filled in for her by her attorneys.

[fol. 47] Continental's claim form was entitled "AFFIDAVIT OF CLAIMANT FOR INDEMNITY FOR DEATH OF". Question 2 asked: "Do you claim indemnity as beneficiary, executor, administrator, guardian, trustee or assignee?" This question was answered: "Beneficiary."

Fidelity's claim form was entitled "Statement of Beneficiary". At the bottom of this form, immediately beneath the line on which Ruth affixed her signature, is a line, close under which was printed: "Official capacity of Claimant if claim is made in such capacity." This line was left blank.

The principal sums of the two policies, totalling $125,000, were received in due course by Ruth from the insurance companies. This amount was not included in decedent's gross estate in the estate tax return filed by the executors of his will.

OPINION

RAUM, *Judge*: The $125,000 proceeds of the two insurance policies were paid over to the decedent's widow as a consequence of his death. The issue before us is whether such proceeds were includable in his gross estate under Section 2042 of the Internal Revenue Code of 1954 which provides:

> The value of the gross estate shall include the value of all property—
>
> . . . . . .
>
> (2) Receivable by other beneficiaries.—To the extent of the amount receivable by all other beneficiaries

as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person.
* * *

[fol. 48] 1. At the out set we are met by petitioner's contention that the policies in question are not "policies on the life of the decedent" within the meaning of the statute. Petitioner argues that these policies are of the type often characterized as "accident insurance" or "flight insurance", and do not possess many of the features of what is commonly referred to as "life insurance." But the question raised is no longer open.

A similar contention was rejected some 33 years ago in *Leopold Ackerman*, 15 B.T.A. 635, where it was held that amounts paid on account of accidental death under accident policies were amounts received "as insurance under policies taken out by the decedent upon his own life" within Section 302(g) of the Revenue Act of 1924. The 1954 Code before us, although significantly different in other respects, is substantially identical in relation to the question whether the accident policies constitute "insurance * * * on the life of the decedent". While recognizing that there are distinctions between life insurance and accident insurance, Ackerman nevertheless held that both may be "upon the life" of the insured. "In each case the risk assumed by the insurer is the loss of the insured's life, and the payment of the insurance money is contingent upon the loss of life". 15 B.T.A. at p. 637. It is too late to raise the issue herein. The matter has been settled for too long a period to warrant reexamination. The statutory provisions involved are substantially identical as they relate to this question. We follow *Ackerman* here.

2. We pass therefore to consider whether the insurance proceeds are otherwise covered by Section 2042(2). Our inquiry is simply whether, in relation to these policies, "the decedent possessed at his death any of the incidents of [fol. 49] ownership, exercisable either alone or in conjunction with any other person." These provisions ap-

peared for the first time in the 1954 Code. Whether the policies were "taken out" by the decedent or whether he paid the premiums are no longer the touchstone of taxability under the new statute. Both the House and Senate Committee reports accompanying the legislation contained the following statement:

> • • • This section revises existing law so that payment of premiums is no longer a factor in determining the taxability under this section of insurance proceeds. Insurance proceeds payable to the executor will continue to be taxes as under existing law. This section also requires the inclusion in the decedent's estate of insurance proceeds receivable by all other beneficiaries under a policy on the decedent's life with respect to which the decedent at death possessed any of the incidents of ownership exercisable either alone or in conjunction with any other person. • • •

H. Rept. No. 1337, 83rd Cong., 2d Sess., p. A316; S. Rept. No. 1622, 83rd Cong. 2d Sess., p. 472.

Did the decedent herein possess any of the incidents of ownership in the two policies before us? An examination of both policies requires an unequivocally affirmative answer. In each policy there is a paragraph entitled "Change of Beneficiary", in each of which the following appears:

> Change of Beneficiary: The right to change of beneficiary is reserved to the Insured and the consent of the beneficiary or beneficiaries shall not be requisite to surrender or assignment of this policy or to any change of beneficiary or beneficiaries, or to any other changes in this policy.

[fol. 50] It is argued by petitioner that the foregoing provision in the policies was merely "boiler plate", that the decedent did not desire any such right, and that he could not have obtained the policies without such provision. Granted that all this be true, it does not advance petitioner's position. Whether or not the right to change the beneficiary was "boiler plate", it was part of the contractual relationship with each insurance company and

defined a legal right of the decedent.[1] The right to change beneficiaries is one of the recognized "incidents of ownership", and accordingly the statute is applicable.

Nor is a different result required by reason of the contention that the decedent's wife paid the premiums or that the policies were "assigned" to her. To be sure, we heard testimony that she paid the premiums, but we were not entirely convinced, and since taxability under the 1954 Code does not depend upon who paid the premiums, we have not made any finding one way or the other as to this matter.[2] To establish an assignment, the decedents wife testified that the decedent told the clerk at the airport to give the policies to her, that they "now belonged" to her, and that "he had [fol. 51] nothing more to do with them." We think that the delivery of the policies to her in such circumstances hardly establishes an assignment. It must be recalled that the policies contained provisions for insurance in respect of various bodily injuries short of death, and in such circumstances we are not convinced that petitioner intended to part with all rights in the policies. Rather, the testimony, even if strictly accurate suggests merely that the decedent was indulging in a common practice of giving physical possession of the policies to the beneficiary so that, in the event of a fatal accident, she would be in a position to assert her rights under the policies. We do not find that by these oral statements, the decedent intended to make any irrevocable disposition of all his rights

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[1] This is not a case of erroneous provisions in the policies or the inclusion of provisions which resulted from unauthorized action by an insurance agent, which might have been corrected by reformation of the policies after they were issued. Cf. *Schongalla* v. *Hickey*, 149 F. 2d 687 (C.A. 2), and *National Metropolitan Bank* v. *United States*, 87 F. Supp. 773 (C. Cls.), relied upon by petitioner.

[2] In any event, in this connection, even if it be assumed that she paid the premiums, cf. *Fried* v. *Granger*, 105 F. Supp. 564 (D.C. W.D.Pa.), affirmed per curiam 202 F. 2d 150 (C.A. 3); *Hall* v. *Wheeler*, 174 F. Supp. 418 (D. Maine); *Estate of Michael Collino*, 25 T.C. 1026.

under the policies,[3] even assuming that he could legally do so in that manner.[4]

Petitioner makes further contention that the right to change the beneficiary was illusory since, as a practical [fol. 52] matter, the decedent would have been unable to exercise that right during flight. The argument proves too much. The same would be true with respect to any policy of life insurance, and the mere fact that the insured at the moment of death might be temporarily incapacitated from exercising his rights has never been thought to vitiate the effect of such retained rights. Cf. *Estate of Edward L. Hurd*, 6 T.C. 819, affirmed 160 F. 2d 610 (C.A. 1); *Estate of Virginia H. West*, 9 T.C. 736, affirmed 173 F.2d 505 (C.A. 8); *Estate of Charles S. Inman*, 18 T.C. 522, reversed on other grounds, 203 F. 2d 679 (C.A. 2); Rev. Rul. 61-123, 1961-2 Cum. Bull. 151. Moreover, it must be remembered that the policies were not limited to accident on a one-way voyage; they covered a *round trip*, and in the normal course the right to change the beneficiary would have been meaningful prior to commencement of the return trip. Of course, decedent's wife was in possession of the policies, and to the extent that her acquiescence may have been

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[3] Compare in this respect *Franklin Life Insurance Company* v. *Falkingham*, 229 F. 2d 300 (C.A. 7), where the physical delivery of a policy to the insured's wife was held not to be an assignment even where such delivery was accompanied by the following declaration (p. 304):

> * * * Here, Honey, is your insurance. Take it and keep it. You are the *beneficiary*. And never let it go, regardless of what happens to me. It is yours.

[4] We accordingly do not consider whether such alleged oral assignment would have been valid under the law of New York where the delivery of the policies occurred and where such assignment was alleged to have taken place. Cf. *McNamee* v. *Griffin*, 285 App. Div. 886, 137 N.Y. Supp. 749, affirmed 309 N.Y. 864, 131 N.E. 2d 284; *Katzman* v. *Aetna Life Ins. Co.*, 285 App. Div. 446, 137 N.Y. Supp. 583, reversed 309 N.Y. 197, 128 N.E. 2d 307.

necessary in order to effectuate a change of beneficiary[5] such circumstances would not render the statute inapplicable. For the statute speaks in terms of incidents of ownership "exercisable either alone or in conjunction with any other person." And the unrestricted words " in conjunction with any other person" include persons having an adverse beneficial interest. *Helvering* v. *City Bank Farmers Trust Co.*, 296 U.S. 85; *Hall* v. *Wheeler*, 174 F. Supp. 418, 421 (D Maine).

We hold that the proceeds of the two policies in controversy are includable in the decedent's gross estate.

Decision will be entered under Rule 50.

[fol. 53] BEFORE THE TAX COURT OF THE UNITED STATES

Docket No. 90028

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

PETITION FOR REVIEW—Filed April 5, 1963

The Estate of Marshal L. Noel, William H. Frantz and Ruth M. Noel, Executors, hereby petition for a review by the United States Court of Appeals for the Third Circuit of the decision of the Tax Court in the above matter filed January 8, 1963 finding a deficiency in the Estate Tax in said Estate.

The Estate Tax return in connection with the aforementioned Estate was filed with the District Director of Internal Revenue at Newark, New Jersey.

Dated: April 4, 1963.

Edward F. Merrey, Jr., Attorney for Petitioners.

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[5] The change of beneficiary clause in both policies provides, however, that "the consent of the beneficiary * * * shall not be requisite * * * to any change of beneficiary * * *."

[fol. 54] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,441

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, Executors, Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

On Petition for Review of Decision of the Tax Court of the United States

Argued December 2, 1963

Before: STALEY, GANEY and SMITH, *Circuit Judges*.

OPINION OF THE COURT—Filed June 17, 1964

By SMITH, *Circuit Judge*.

This case is here on a petition to review a decision of the Tax Court. The principal question for decision is whether the proceeds of an air flight insurance policy paid to the designated beneficiary are includible in the gross estate of the decedent under § 2042(2) of the 1954 Internal Revenue Code, 26 U.S.C.A. § 2042(2). The question is admittedly one of novel impression not wholly free of difficulty.

[fol. 55] The pertinent provisions of the cited statute read as follows:

> "The value of the gross estate shall include the value of all property——
>
> . . . . . .
>
> "(2) . . . To the extent of the amount receivable by . . . beneficiaries as INSURANCE UNDER POLICIES ON THE LIFE OF THE DECEDENT with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person." (Emphasis supplied).

The answer to the question here raised depends on the construction to be given the term "insurance under policies on the life of the decedent," which is not defined by the Code. The term "insurance" is defined by regulation as "life insurance of every description, including death benefits paid by fraternal benefit societies operating under the lodge system." 26 C.F.R. § 20.2042-1. We find this definition of little assistance in the instant case.

The decedent, immediately prior to enplaning on a round trip to Venezuela, made written application for two flight insurance policies, each in the amount of $62,500. The premiums, in the total amount of $5, were paid by his wife, the named beneficiary, to whom the policies were delivered upon issuance. The policies, dissimilar in some minor respects but otherwise in the usual form, insured against loss of life or specified bodily injury [1] suffered by the insured as the result of an aircraft accident occurring during any part of the flight. In the event of the insured's death the benefits were payable to the designated beneficiary, and in the event of bodily injury the benefits were payable to the insured. Each policy reserved to the insured the right to assign it or to change the beneficiary [fol. 56] therefore without the consent of the beneficiary originally designated. These were exercisable incidents of ownership within the meaning of the statute.

While en route to Venezuela, and within a few hours after departure from the airport, the plane on which the decedent was a passenger crashed into the Atlantic Ocean, killing all on board. The widow of the decedent, asserting a right to the proceeds of the policies as the designated beneficiary thereunder, filed the required proofs of claim on the basis of which she received the benefits. The petitioners, executors of the decedent's estate, filed the required estate tax return but failed to include in the gross estate of the decedent the amounts received by the beneficiary under the said policies. The respondent, having found that the proceeds of the policies were includible in

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[1] The policies provided for the payment of a special amount for each of several enumerated injuries and for the payment of the principal sum in the event of accidental death.

the gross estate of the decedent, determined that there was a deficiency in respect to the taxes due and gave written notice thereof to the petitioners.

The determination of the deficiency was sustained by the Tax Court in the decision here on review. The decision rests solely on the case of Leopold Ackerman v. Commissioner, 15 B.T.A. 635, decided in 1929. Therein the Board of Tax Appeals held that the term "policies taken out by the decedent upon his own life," as used in § 302(g) of the Revenue Act of 1924, referred not only to ordinary life insurance policies but also to accident policies which covered the risk of accidental death as well as bodily injury. We are of the view that this construction was erroneous, as is the decision of the Tax Court in the instant case.

It is a settled rule of construction that where a term employed in a statute is not therein defined, the term must be given its ordinary, plain and generally accepted meaning. Crane v. Commissioner, 331 U.S. 1, 6 (1947); Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932); United States v. Merchants National Bank of Mobile, 261 F. 2d 570, 575 (5th Cir. 1958); Torti v. United [fol. 57] States, 249 F. 2d 623, 625 (7th Cir. 1957). This conventional rule is particularly applicable where, as here, we are called upon to interpret a provision of the Internal Revenue Code, Ibid., and the application of the rule will not lead "to an unreasonable result plainly at variance with the policy of the legislation as a whole." See Ozawa v. United States, 260 U.S. 178, 194 (1922); Acheson v. Fujiko Furusho, 212 F. 2d 284, 295 (9th Cir. 1954).

While life insurance and accident insurance possess certain features common to both, there is a commonly understood and well defined distinction between them. The dominant purpose of the policy as reflected by the risk or contingency insured against is usually determinative of the nature of the insurance. Bowles v. Mutual Ben. Health & Accident Ass'n., 99 F. 2d 44, 48, 49 (4th Cir. 1938); Baumann v. Preferred Accident Ins. Co. of New York, 122 N.E. 628, 629 (Ct. App. N.Y. 1919); see also Couch, Cyclopedia of Insurance Law, § 34; Appleman, Insurance Law and Practice, § 392. The policies here in question must be judged by this determinant.

A life insurance policy is a contract by the terms of which the insurer, in return for the payment of the prescribed premiums, agrees to pay a specified sum upon the occurrence of an inevitable event. The contingency insured against is the death of the insured regardless of its cause unless, of course, the cause is one excepted under the policy. Oglesby-Barnitz Bank and Trust Co. v. Clark, 175 N.E. 2d 98, 103 (Ct. App. Ohio, 1959); Orr v. Prudential Ins. Co. of America, 174 N.E. 204 (Sup. Jud. Ct. Mass., 1931); Couch and Appleman, supra. Life insurance has several economic and investment features not common to accident insurances. Upon issuance of the policy the insurer assumes an absolute risk of loss and the insured acquires an immediate estate which by the terms of the policy is transferrable on his death.[2] See Chase Nat. Bank [fol. 58] v. United States, 278 U.S. 327 (1929). The purpose of § 2042(2), supra, as well as its earliest counterpart, infra, was to bring such estates within the reach of the revenue laws for reasons hereinafter discussed.

An accident policy, particularly of the type here in question, is a contract by the terms of which the insurer agrees to indemnify the insured in case of bodily injury, or the designated beneficiary in case of the death of the insured, for any loss sustained by reason of an event which is evitable and not likely to occur. The contingency insured against is the accident, death being only one of several liability creating consequences. See the authorities cited in the preceding paragraph. Upon issuance of the policy the insurer assumes a conditional risk of loss and the insured, as well as the beneficiary, acquire nothing more than an inchoate and defeasible right. An accident policy which provides for the payment of the principal sum in the event of the insured's accidental death is not thereby converted into a life policy; such a feature does not alter the essential nature of the insurance.

A further aid to construction is the history of the enactment which clearly indicates the intent of Congress and the purpose of the legislation, preponderating guides to the interpretation of statutory phrases of doubtful

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[2] This assumes that the policy remains in force and there is compliance with its terms and conditions.

meaning. Harrision v. Northern Trust Co., 317 U.S. 476, 479, 480 (1943); United States v. Amer. Trucking Ass'ns., 310 U.S. 534, 543, 544 (1940); Holy Trinity Church v. United States, 143 U.S. 457 (1892); J. C. Penney Company v. C.I.R., 312 F. 2d 65, 68 (2nd Cir. 1962); City of Newark v. United States, 254 F. 2d 93, 97, 98 (3rd Cir. 1958). The statutory provision here in question emerged from a comparable provision contained in the Revenue Act of 1918, infra, which we consider in the light of the mischief sought to be corrected and the end sought to be attained.

The estate tax as a permanent source of revenue was adopted by the Revenue Act of 1916, and particularly [fol. 59] §§ 201 and 202 thereof,[3] 39 Stat. 777 and 778. Section 202 defined the items of real and personal property includible in the gross estate of the decedent for tax purposes but made no specific reference to the proceeds of life insurance policies. Such proceeds were includible in the estate only to the extent of the amount receivable by the executor in his fiduciary capacity. As a result of this deficiency the impact of the estate tax on the proceeds of life insurance policies could be avoided by the simple expedient of making such proceeds payable to a specific beneficiary other than the executor.

The deficiency, soon recognized by Congress, was corrected by the enactment of § 402(f) of the Revenue Act of 1918, 40 Stat. 1097, 1098, which read in pertinent part as follows:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property real or personal, tangible or intangible, wherever situated. . . .
>
> • • • • • • • •
>
> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess of $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

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[3] The estate tax as a source of revenue was resorted to earlier only in critical periods of emergency.

The obvious intent of Congress and the purpose of the enactment was to foreclose the possibility of tax avoidance under the existing law.

The Committee on Ways and Means of the 65th Congress submitted a report [4] in which it stated:

> "The provision with respect to specific beneficiaries has been included for the reason that insurance [fol. 60] payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and OVER WHICH THE EXECUTOR EXERCISES NO CONTROL. Amounts passing in this way are not liable for expenses of administration or debts of the decedent and therefore DO NOT FALL WITHIN THE EXISTING PROVISIONS DEFINING THE GROSS ESTATE. It has been brought to the attention of the Committe THAT WEALTHY PERSONS HAVE AND NOW ANTICIPATE RESORTING TO THIS METHOD OF DEFEATING THE ESTATE TAX. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that SUCH INSURANCE WOULD NOT BE INCLUDED IN THE GROSS ESTATE. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum." (Emphasis supplied).

Section 402(f), supra, was retained without change as a part of the federal estate tax law until it was amended by § 404(g) of the Revenue Act of 1942, 56 Stat. 944, which became § 811(g) of the Internal Revenue Act of 1939, 26 U.S.C.A. The amendment changed the test of "includibility" [5] and in effect placed the proceeds of life insurance policies payable to designated beneficiaries on a par with other property transferrable on the death of the decedent.

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[4] Revenue Act of 1918, 65th Congress, 2d Session, House Report 767, p. 22.

[5] The new tests of includibility were: (a) the payment of premiums "directly or indirectly by the decedent," and (b) the "incidents of ownership" possessed by the insured at his death.

Section 2042(2), supra, follows substantially the 1942 Act except that it eliminates as a test of "includibility" the payment of premiums "directly or indirectly by the decedent." The purpose of this last provision, like that of its earliest predecessor, is to foreclose resort to the purchase of life insurance as a means of tax avoidance.

[fol. 61] We are of the opinion, and so hold, that the term "insurance under policies on the life of the decedent" does not comprehend insurance under accident policies of the kind here in question. We are of the further opinion that any other construction, particularly the one here urged by thhe respondent, would lead to an unreasonable result at variance with the intent of Congress and the manifest purpose of the statute as a whole.

The decision of the Tax Court will be reversed.

[fols. 62-64] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 14,441

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS, Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE, Respondent

On Petition to Review a Decision of the Tax Court of the United States

Present: STALEY, GANEY and SMITH, *Circuit Judges.*

JUDGMENT—June 17, 1964

This cause came on to be heard on the record from Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the

said Tax Court in this cause be, and the same is hereby reversed.

June 17, 1964

[File endorsement omitted.]

[fol. 65] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 66] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE, Petitioner,

v.

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS.

ORDER ALLOWING CERTIORARI—December 7, 1964

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1964 758300 699

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FILED
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JOHN F. DAVIS, CLERK

No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1964

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

ARCHIBALD COX,
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Assistant Attorney General,

LORING W. POST,
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Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1964

No. ———

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, EXECUTORS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the Commissioner of Internal Revenue, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 41a-52a)[1] are reported at 39 T.C. 466. The opinion of the Court of Appeals (Appendix, *infra*, pp. 8-16) is reported at 332 F. 2d 950.

[1] "R." references are to the record appendix printed as a part of the Brief for Petitioner in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1964. (Appendix, *infra*, p. 17.) The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254(1).

QUESTION PRESENTED

Whether payments made to the beneficiary of two flight accident insurance policies on account of the death of the insured were received "as insurance under policies on the life of the decedent" within the meaning of Section 2042 of the Internal Revenue Code of 1954.

STATUTE INVOLVED

Internal Revenue Code of 1954 (26 U.S.C. 1958 ed.):

> SEC. 2042. PROCEEDS OF LIFE INSURANCE.
>
> The value of the gross estate shall include the value of all property—
>
> (1) * * *
>
> (2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *

STATEMENT

Marshal L. Noel died on June 20, 1956, when the airplane on which he was a passenger crashed into the

Atlantic Ocean. (R. 42a; Appendix, *infra*, p. 10.) Just prior to taking off, he had applied for two flight insurance policies, each in the principal amount of $62,500. (R. 43a; Appendix, *infra*, p. 9.) After the premiums of $2.50 were paid, each policy was delivered to the decedent's wife, the named beneficiary. (R. 44a; Appendix, *infra*, p. 9). The policies provided for specified payments to the insured for certain bodily injuries sustained as a result of an accident in the course of the flight and for payment of the principal sum ($62,500) to the designated beneficiary in the event of loss of life in such an accident. Each policy reserved to the insured the right to assign the policy and to change the beneficiary without the consent of the beneficiary originally designated. (R. 44a, 45a; Appendix, *infra*, pp. 9-10.)

On June 25, 1956, decedent's wife made claim for the insurance payable under the two policies and in due course received the principal sums totalling $125,000. (R. 46a, 47a; Appendix, *infra*, p. 10.) This amount was not included in decedent's gross estate in the estate tax return filed by the executors of his will. The Commissioner of Internal Revenue determined that the proceeds of the policies should be included and the Tax Court sustained that determination. (R. 52a; Appendix, *infra*, p. 10.) The Court of Appeals reversed. (Appendix, *infra*, p. 17.)

REASONS FOR GRANTING THE WRIT

The opinion of the Third Circuit has upset a firmly established interpretation of the statutory provision involved—an interpretation which has governed the

rights of thousands of taxpayers since the initial resolution of the question by the Board of Tax Appeals in 1929. *Ackerman* v. *Commissioner*, 15 B.T.A. 635. Although the Third Circuit was the first appellate court to consider the question and there is as yet no conflict of appellate decisions, a large amount of money is involved in policies issued annually and the question has substantial administrative significance. The decision below is bound to engender much uncertainty and resulting litigation which can be forestalled by prompt review by this Court without awaiting the almost inevitable conflict among the circuits.

Ackerman v. *Commissioner*, 15 B.T.A. 635, held that proceeds of accident policies and double indemnity life insurance policies paid by reason of accidental death were paid pursuant to "insurance under policies taken out by the decedent upon his own life", within the meaning of Section 302(g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304-305. That decision was accepted as correct and has gone unchallenged for thirty-five years. It has been cited with approval by this Court in *Helvering* v. *Le Gierse*, 312 U.S. 531, 539, and by such recognized authorities on estate taxation as Lowndes and Kramer, *Estate & Gift Taxes* (1962 ed.), pp. 290-291, 1 Paul, *Federal Estate & Gift Taxation* (1942), pp. 507-508, and 2 Mertens, *Law of Federal Gift and Estate Taxation* (1959 ed.), p. 340. Since 1929 it has governed the practice of the Treasury with respect to includability of insurance proceeds of the type involved here.[2] The subsequent Congres-

[2] The Treasury Regulations have long provided that the "term 'insurance' refers to life insurance of every description"

sional re-enactments of the controlling statutory provision have not substantially altered the language first interpreted in *Ackerman*. Section 2042 of the Internal Revenue Code of 1954, *supra*, p. 2, the applicable section, provides for the inclusion of proceeds from "insurance under policies on the life of the decedent".[3]

Overturning this long-standing interpretation, the court of appeals held that flight accident insurance was not life insurance because under life insurance the insurer "agrees to pay a specified sum upon the occurrence of an inevitable event," whereas accident insurance covers a risk "which is evitable and not likely to occur". (Appendix, *infra*, p. 12). Even if this distinction could be maintained, it would be irrelevant, for the statutory wording is intended to cover every form of insurance compensation for the loss of life of the insured, *i.e.* all benefits from insurance "on the life of the decedent". But the distinction is also untenable; it would withdraw from the estate tax such conceded forms of life insurance as term insurance which is payable only in the "evita-

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(see *e.g.*, Treasury Regulations on Estate Tax (1954 Code), Section 20.2042-1(a)) and it has generally been assumed that this provision is broad enough to cover amounts payable under policies of the instant type as a result of accidental death of the insured.

[3] Section 2042 was first enacted as Section 402(f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097-1098. This section was re-enacted in Section 402(f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278-279; in Section 302(g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304, 305, and the Revenue Act of 1926, c. 27, 44 Stat. 9, 70-71; and in Section 811(g) of the Internal Revenue Code of 1939.

ble" event that the insured dies within a specified period of time. Finally, this distinction has no relevance to the Congressional policies reflected in the estate tax which, as a general matter, seek to bring into the gross estate all items of value owned by the decedent, or over which the decedent exercised control during his life.[4]

The court below recognized that its opinion was not confined to flight accident insurance and that it had to reject the holding of *Ackerman*. Thus the decision would equally exclude from the gross estate the proceeds of general accident policies and part of the proceeds of double-indemnity life insurance policies paid by reason of accidental death.

The question is therefore one of broad administrative significance. Over seven million policies like those in the instant case are issued each year. Under these and other policies, casualty insurance companies paid about $7,000,000 for loss of life from airplane accidents in 1963. Under all forms of accident insurance, death payments on account of accidental death totalled approximately $73,000,000 in 1962. It thus appears that a substantial amount of litigation can be expected if the instant decision is allowed to stand until, almost certainly, a conflict in decisions develops among

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[4] In this respect, both courts below agreed that the decedent had retained sufficient "incidents of ownership", within the meaning of that phrase in Section 2042, to require inclusion of the proceeds in decedent's gross estate if they were paid pursuant to "insurance under policies on the life of the decedent". (R. 48a; Appendix, *infra*, p. 10.)

the circuits. Resolution of the question at this time would eliminate the confusion and uncertainty injected into existing law by the court of appeals' decision and will also avoid the predictable but unnecessary stream of litigation.

CONCLUSION

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER, 1964.

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,441

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors, PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE TAX COURT OF THE UNITED STATES

Argued December 2, 1963

Before: STALEY, GANEY and SMITH, *Circuit Judges.*

OPINION OF THE COURT

(Filed June 17, 1964)

BY SMITH, *Circuit Judge.*

This case is here on petition to review a decision of the Tax Court. The principal question for decision is whether the proceeds of an air flight insurance policy paid to the designated beneficiary are includible in the

gross estate of the decedent under § 2042(2) of the 1954 Internal Revenue Code, 26 U.S.C.A. § 2042(2). The question is admittedly one of novel impression not wholly free of difficulty.

The pertinent provisions of the cited statute read as follows:

> "The value of the gross estate shall include the value of all property—
>
> * * * * *
>
> "(2) . . . To the extent of the amount receivable by . . . beneficiaries as INSURANCE UNDER POLICIES ON THE LIFE OF THE DECEDENT with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person." (Emphasis supplied).

The answer to the question here raised depends on the construction to be given the term "insurance under policies on the life of the decedent," which is not defined by the Code. The term "insurance" is defined by regulation as "life insurance of every description, including death benefits paid by fraternal benefit societies operating under the lodge system." 26 C.F.R. § 20.2042-1. We find this definition of little assistance in the instant case.

The decedent, immediately prior to enplaning on a round trip to Venezuela, made written application for two flight insurance policies, each in the amount of $62,500. The premiums, in the total amount of $5, were paid by his wife, the named beneficiary, to whom the policies were delivered upon issuance. The policies, dissimilar in some minor respects but otherwise in the usual form, insured against loss of life or

specified bodily injury [1] suffered by the insured as the result of an aircraft accident occurring during any part of the flight. In the event of the insured's death the benefits were payable to the designated beneficiary, and in the event of bodily injury the benefits were payable to the insured. Each policy reserved to the insured the right to assign it or to change the beneficiary thereof without the consent of the beneficiary originally designated. These were exercisable incidents of ownership within the meaning of the statute.

While en route to Venezuela, and within a few hours after departure from the airport, the plane on which the decedent was a passenger crashed into the Atlantic Ocean, killing all on board. The widow of the decedent, asserting a right to the proceeds of the policies as the designated beneficiary thereunder, filed the required proofs of claim on the basis of which she received the benefits. The petitioners, executors of the decedent's estate, filed the required estate tax return but failed to include in the gross estate of the decedent the amounts received by the beneficiary under the said policies. The respondent, having found that the proceeds of the policies were includible in the gross estate of the decedent, determined that there was a deficiency in respect to the taxes due and gave written notice thereof to the petitioners.

The determination of the deficiency was sustained by the Tax Court in the decision here on review. The decision rests solely on the case of Leopold Ackerman v. Commissioner, 15 B.T.A. 635, decided in 1929. Therein the Board of Tax Appeals held that the term

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[1] The policies provided for the payment of a specified amount for each of several enumerated injuries and for the payment of the principal sum in the event of accidental death.

"policies taken out by the decedent upon his own life," as used in § 302(g) of the Revenue Act of 1924, referred not only to ordinary life insurance policies but also to accident policies which covered the risk of accidental death as well as bodily injury. We are of the view that this construction was erroneous, as is the decision of the Tax Court in the instant case.

It is a settled rule of construction that where a term employed in a statute is not therein defined, the term must be given its ordinary, plain and generally accepted meaning. Crane v. Commissioner, 331 U.S. 1, 6 (1947); Old Colony R. Co. v. Commissioner, 284 U.S. 552, 560 (1932); United States v. Merchants National Bank of Mobile, 261 F.2d 570, 575 (5th cir. 1958); Torti v. United States, 249 F.2d 623, 625 (7th Cir. 1957). This conventional rule is particularly applicable where, as here, we are called upon to interpret a provision of the Internal Revenue Code, Ibid., and the application of the rule will not lead "to an unreasonable result plainly at variance with the policy of the legislation as a whole." See Ozawa v. United States, 260 U.S. 178, 194 (1922); Acheson v. Fujiko Furusho, 212 F.2d 284, 295 (9th Cir. 1954).

While life insurance and accident insurance possess certain features common to both, there is a commonly understood and well defined distinction between them. The dominant purpose of the policy as reflected by the risk or contingency insured against is usually determinative of the nature of the insurance. Bowles v. Mutual Ben. Health & Accident Ass'n., 99 F.2d 44, 48, 49 (4th Cir. 1938); Baumann v. Preferred Accident Ins. Co. of New York, 122 N.E. 628, 629 (Ct. App. N.Y. 1919); see also Couch Cyclopedia of Insurance Law, § 34; Appleman, Insurance Law and Practice, § 392. The policies here in question must be judged by this determinant.

A life insurance policy is a contract by the terms of which the insurer, in return for the payment of the prescribed premiums, agrees to pay a specified sum upon the occurrence of an inevitable event. The contingency insured against is the death of the insured regardless of its cause unless, of course, the cause is one excepted under the policy. Oglesby-Barnitz Bank and Trust Co. v. Clark, 175 N.E. 2d 98, 103 (Ct. App. Ohio, 1959); Orr v. Prudential Ins. Co. of America, 174 N.E. 204 (Sup. Jud. Ct. Mass., 1931); Couch and Appleman, supra. Life insurance has several economic and investment features not common to accident insurance. Upon issuance of the policy the insurer assumes an absolute risk of loss and the insured acquires an immediate estate which by the terms of the policy is transferrable on his death.[2] See Chase Nat. Bank v. United States, 278 U.S. 327 (1929). The purpose of § 2042(2), supra, as well as its earliest counterpart, infra, was to bring such estates within the reach of the revenue laws for reasons hereinafter discussed.

An accident policy, particularly of the type here in question, is a contract by the terms of which the insurer agrees to indemnify the insured in case of bodily injury, or the designated beneficiary in case of the death of the insured, for any loss sustained by reason of an event which is evitable and not likely to occur. The contingency insured against is the accident, death being only one of several liability creating consequences. See the authorities cited in the preceding paragraph. Upon issuance of the policy the insurer assumes a conditional risk of loss and the insured, as well as the beneficiary, acquire nothing more

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[2] This assumes that the policy remains in force and there is compliance with its terms and conditions.

than an inchoate and defeasible right. An accident policy which provides for the payment of the principal sum in the event of the insured's accidental death is not thereby converted into a life policy; such a feature does not alter the essential nature of the insurance.

A further aid to construction is the history of the enactment which clearly indicates the intent of Congress and the purpose of the legislation, preponderating guides to the interpretation of statutory phrases of doubtful meaning. Harrison v. Northern Trust Co., 317 U.S. 476, 479, 480 (1943); United States v. Amer. Trucking Ass'ns., 310 U.S. 534, 543, 544 (1940); Holy Trinity Church v. United States, 143 U.S. 457 (1892); J. C. Penney Company v. C.I.R., 312 F.2d 65, 68 (2nd Cir. 1962); City of Newark v. United States, 254 F.2d 93, 97, 98 (3rd Cir. 1958). The statutory provision here in question emerged from a comparable provision contained in the Revenue Act of 1918, infra, which we consider in the light of the mischief sought to be corrected and the end sought to be attained.

The estate tax as a permanent source of revenue was adopted by the Revenue Act of 1916, and particularly §§ 201 and 202 thereof,[3] 39 Stat. 777 and 778. Section 202 defined the items of real and personal property includible in the gross estate of the decedent for tax purposes but made no specific reference to the proceeds of life insurance policies. Such proceeds were includible in the estate only to the extent of the amount receivable by the executor in his fiduciary capacity. As a result of this deficiency the impact of the estate tax on the proceeds of life in-

[3] The estate tax as a source of revenue was resorted to earlier only in critical periods of emergency.

surance policies could be avoided by the simple expedient of making such proceeds payable to a specific beneficiary other than the executor.

The deficiency, soon recognized by Congress, was corrected by the enactment of § 402(f) of the Revenue Act of 1918, 40 Stat. 1097, 1098, which read in pertinent part as follows:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated. . . .
>
> * * * *
>
> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess of $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

The obvious intent of Congress and the purpose of the enactment was to foreclose the possibility of tax avoidance under the existing law.

The Committee on Ways and Means of the 65th Congress submitted a report[*] in which it stated:

> "The provision with respect to specific beneficiaries has been included for the reason that insurance payable to such beneficiaries usually passes under a contract to which the insurance company and the individual beneficiary are the parties in interest and OVER WHICH THE EXECUTOR EXERCISES NO CONTROL. Amounts passing

[*] Revenue Act of 1918, 65th Congress, 2d Session, House Report 767, p. 22.

in this way are not liable for expenses of administration or debts of the decedent and therefore DO NOT FALL WITHIN THE EXISTING PROVISIONS DEFINING THE GROSS ESTATE. It has been brought to the attention of the Committee THAT WEALTHY PERSONS HAVE AND NOW ANTICIPATE RESORTING TO THIS METHOD OF DEFEATING THE ESTATE TAX. Agents of insurance companies have openly urged persons of wealth to take out additional insurance payable to specific beneficiaries for the reason that SUCH INSURANCE WOULD NOT BE INCLUDED IN THE GROSS ESTATE. A liberal exemption of $40,000 has been included and it seems not unreasonable to require the inclusion of amounts in excess of this sum." (Emphasis supplied).

Section 402(f), supra, was retained without change as a part of the federal estate tax law until it was amended by § 404(g) of the Revenue Act of 1942, 56 Stat. 944, which became § 811(g) of the Internal Revenue Act of 1939, 26 U.S.C.A. The amendment changed the test of "includibility" [5] and in effect placed the proceeds of life insurance policies payable to designated beneficiaries on a par with other property transferrable on the death of the decedent. Section 2042(2), supra, follows substantially the 1942 Act except that it eliminates as a test of "includibility" the payment of premiums "directly or indirectly by the decedent." The purpose of this last provision, like that of its earliest predecessor, is to foreclose resort to the purchase of life insurance as a means of tax avoidance.

[5] The new tests of includibility were: (a) the payment of premiums "directly or indirectly by the decedent," and (b) the "incidents of ownership" possessed by the insured at his death.

We are of the opinion, and so hold, that the term "insurance under policies on the life of the decedent" does not comprehend insurance under accident policies of the kind here in question. We are of the further opinion that any other construction, particularly the one here urged by the respondent, would lead to an unreasonable result at variance with the intent of Congress and the manifest purpose of the statute as a whole.

The decision of the Tax Court will be reversed.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14,441

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors, PETITIONERS

vs.

COMMISSIONER OF INTERNAL REVENUE, RESPONDENT

ON PETITION TO REVIEW A DECISION OF THE TAX COURT OF THE UNITED STATES

Present: STALEY, GANEY and SMITH, *Circuit Judges.*

JUDGMENT

This cause came on to be heard on the record from the Tax Court of the United States, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court that the decision of the said Tax Court in this cause be, and the same is hereby reversed.

June 17, 1964

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE,
Petitioner,

vs.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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BRIEF FOR THE RESPONDENTS IN OPPOSITION

Statement

The petition of the Commissioner of Internal Revenue sets forth the citation of the opinions below, the jurisdictional basis, the question presented, and the statute involved. There is no reason to repeat them here.

The factual statement of petitioner insofar as it relates to the opinion below sets forth, in essence, the facts concerning the death of decedent, the purchase of the flight policies, the collection of the proceeds by his wife, and the conclusion of the Commissioner and the Tax Court the proceeds were part of the decedent's gross taxable estate. However, the Circuit Court did not consider, which it was not required to do by virtue of its opinion, the facts to establish the executors' contention that decedent never had any incidents of ownership in the policies (R 7-11) or, if he did, he had effectively assigned or divested himself of such ownership prior to embarkation (R 12-18).

Reasons for Denying the Writ

The Commissioner seeks a review of the decision of the Court of Appeals for the Third Circuit, which he says "has upset a firmly established interpretation of" §2042 (2) of the Internal Revenue Code of 1954 (Petition, p. 3). That section subjects to the federal estate tax proceeds of insurance receivable by named beneficiaries "under policies on the life of the decedent." The Commissioner argues that "an interpretation which has governed the rights of thousands of taxpayers" for 35 years has been overturned (Petition, p. 3-4); that a contrary result in another circuit is "almost inevitable" (Petition, p. 4); and that the decision of the Third Circuit "is bound to engender much uncertainty and * * * litigation" (Petition, p. 4).

The question, however, is whether there are special and important reasons, for review, and, in the absence of a conflict among the circuits whether the decision below was, within the scope of Rule 19, on an important question of federal law which has not been, but which should be, settled by this Court.

It should be noted at the outset that the Court of Appeals is the first court to consider in depth the novel question of includability for taxation of the proceeds of airplane accident coverage. The opinion below reflects most careful research and exhaustive analysis of the statute, the Congressional intent and the relevant authority on insurance coverage. Such disposition of the issue, the absence of conflict in the circuits on the question and the patent absence of any farreaching question of public importance preclude the granting of the writ.

The special and important reasons assigned by the Commissioner as justification for the writ may be divided into two categories, first, that uncertainty and litigation will be engendered by the decision which almost inevitably will be rejected by other circuits and, secondly, that an interpretation of the statute by the Board of Tax Appeals[1] is acceptable to the Commissioner while the decision of the Court of Appeals for the Third Circuit is not.

With respect to the "stream of litigation" forecast by the Commissioner and his prediction that the Court of Appeals' decision will be rejected by other circuits, it is significant that the Commissioner adverts to no pending litigation in either the Tax Court, the Court of Claims or any Federal district court or court of appeals involving the question.

Respecting the acceptability to the Commissioner of the Board of Tax Appeals' holding as against the holding of the Court of Appeals, the Commissioner seeks to continue a wholly unjustified interpretation of a section of the taxing code to the end that he may include proceeds from accident coverage which is not life insurance in either the

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[1] *Ackerman* v. *Commissioner*, 15 B.T.A. 635.

technical or popularly accepted sense[2] and which can be accomplished only by stretching and distorting the language of the section beyond the meaning of the words, beyond the intent of Congress and beyond the manifest purpose of the statute as a whole. The sole basis for the Commissioner's position appears to be his unshakable adherence to the *Ackerman* decision which in turn was based on a decision[3] which was repudiated by the very court which decided it even prior to reliance upon it by the Board of Tax Appeals.[4]

The Commissioner urges that the decision of the Court of Appeals would withdraw from the estate tax such conceded forms of life insurance as term insurance and part of the proceeds of double indemnity life insurance policies paid by reason of accidental death (Petition, p. 6). This is a perversion of the holding in the instant case. In the first place, the Court of Appeals carefully limited its decision to the flight policies in question by stating: "We are of the opinion, and so hold, that the term 'insurance under policies on the life of a decedent' does not comprehend insurance under accident policies of the kind here in question." The fact is under a double indemnity policy the "risk" involved is nevertheless death and not "accident".

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[2] That these policies were not life insurance is clear from the record. First, the companies that issued the policies were not even authorized to write life insurance; the coverage was accident coverage and neither the insurers or the insurance industry regarded these policies as life insurance policies (R17a, R18a).

[3] *Logan* v. *Fidelity & Casualty Co.*, 146 Mo. 114, 125 (1898).

[4] *Brunswick* v. *Standard Acc. Ins. Co.*, 278 Mo. 154, 166, 213 S. W. 45 (1919); *Andrus* v. *Business Men's Acc. Assn.*, 283 Mo. 442, 453, 223 S. W. 70 (1920); *Aufrichtig* v. *Columbian Nat'l. Ins. Co.*, 298 Mo. 1, 12, 249 S. W. 912 (1923); *Jones* v. *Prudential Insurance Co. of America*, 208 Mo. App. 679, 236 S. W. 429 (1922).

The fact of accident merely determines the amount of payment. Secondly, the Commissioner's suggestion that the proceeds from term life insurance policies may be excluded is absurd. Term life insurance which matures upon death, regardless of cause, is just as effective a form of insurance on the life of decedent as ordinary, limited payment, or endowment life insurance. It has just nothing to do with accident insurance in this context.

Recognizing, as he must, that the decision by the Court of Appeals is in conflict with no other court of appeals' decision, Commissioner, to secure review presumptuously predicts an "almost inevitable" future conflict in the circuits and a stream of litigation (Petition, p. 4, 6, 7). The decision conflicts only with his position. Commissioner requests this Court to settle the issue but the issue is now settled. Commissioner cannot presume that other courts of appeal will reject the eminently correct decision reached by the court below.

The Commissioner suggests that this decision has injected "confusion and uncertainty" into existing laws (Petition, p. 4, 7). To the contrary, the decision is final and sets at rest a novel question. Commissioner's determination to "nonacquiesce" and to relitigate the same issue in other circuits is the only source of possible "confusion and uncertainty." The Commissioner's choice to relitigate may create the stream of litigation which he predicts but this action on his part in and of itself does not supply the special and important reasons for granting the writ.

Commissioner suggests that the question involved is "one of broad administrative significance". The figures cited by Commissioner do not bear this out. Even if insurance proceeds from accidental death coverage are considered to be "* * * insurance under policies on the life

of the decedent * * *" taxation, (assuming the gross estate of the insured is in excess of $60,000.) can arise only if the insurance policies were such that incidents of ownership might be possessed by the particular decedent. Therefore, the mere fact that $7,000,000. was paid under all airplane accident policies in 1963 because of accidents resulting in death, does not establish that the question of includibility is one of broad administrative significance. The Commissioner has not suggested the amount of taxes involved, how many such decedents had taxable estates and how many possessed incidents of ownership in these policies. There is a practical reason why neither a broadly administrative nor an important tax aspect is here involved. The only so-called incidents of ownership in the policies here involved are simply boiler-plate provisions allowing decedent the practically unexercisable right to change beneficiaries.[5] Since such "incident of ownership" is of virtually no practical benefit to the insured and in each instance the insurance company or the insured could in the future unilaterally remove this sentence from airplane accident policies, and thus remove from consideration any attempt to include the proceeds from these policies in the gross estate of any decedent, the question here involved may become moot. The amount of taxes involved may be of no substantial significance.

Absent a clear and cogent demonstration of a substantial administrative question, and it is submitted that there has been no such showing here, *certiorari* should not be granted. In *U. S.* v. *Rimer,* 220 U. S. 547, the Court held

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[5] In the instant case, the Executors have taken the position (and still do) that the boiler plate right to change beneficiary in a single trip airplane accident policy is not "possessed" by the decedent, since being airborne at all times that the policy is in effect, he could not possibly effectually exercise it.

that the action of the Circuit Court of Appeals was final and since the decision either in its character or importance was not within the scope of the grant of power to review by *certiorari,* the writ of *certiorari* was dismissed.

But whether or not a substantial administrative question is involved, the writ of *certiorari* should be denied where, as here, the decision below is correct.

The Commissioner contends Sec. 2042(2) includes "every form of insurance compensation for the loss of life of the insured" (Petition, p. 5). But this is contrary to the Commissioner's own ruling. In Rev. Rul. 57-54, CB 1957-1, p. 298 the Commissioner has ruled that insurance paid pursuant to a contract between an insurance carrier and the owner of an airplane to the personal representatives of a passenger who died as a result of an airplane accident regardless of the owner's legal liability for damages, is not taxable under Sec. 2042 if the payment is conditioned on the execution of a full release of all claims for damages for the death. Furthermore, the Commissioner in this broad statement completely ignores a prerequisite to the tax is the possession by the deceased at his death of incidents of ownership in the policy. It is a radical and unjustified interpretation of the statutory language.

The court below clearly pointed out the marked and substantial differences between life and accident insurance (Petition, p. 11-13).

The underwriting principles involved are totally different. The premium cost and conditions for the issuance of life insurance are dependent upon factors such as the insured's age, health, hereditary background, moral status, temperance and occupation. No such life insurance underwriting factors are considered in airplane accident in-

surance (R. 12a, 13a); obviously because it is not insurance which matures upon mere cessation of life regardless of cause.

Of the some seven or eight million such policies issued per year, all bear the same premium ratio regardless of the insured passenger's age, health, hereditary background, moral status, temperance, occupation or the length of his trip.

Based upon the certainty of payment upon death irrespective of cause, life insurance has taken its place in the forefront of estate planning enabling an insured to effectuate his testamentary desires. In contrast, the inherently speculative nature of single trip airplane accident renders it useless in estate planning. Whereas in life insurance an applicant must meticulously state his desires respecting disposition of cash and surrender values, in this airplane insurance the applicant was neither asked nor permitted to designate disposition of rights—if any there were (R. 16a).

In attacking the decision of the Third Circuit the Commissioner asserts that its distinction between a life policy and an accident policy is "irrelevant" and "untenable" (Petition, p. 5). However, he glosses over the completely different nature of the risks assumed by the issuers of life and accident policies heretofore adverted to and pointed out by the Court below. The Board of Tax Appeals in *Ackerman* v. *Commissioner* (15 BTA 635), failed to note the different nature of the risks assumed by the insurer in an accident policy and in a life policy when it stated "In each case the risk assumed by the insurer is the loss of insured's life * * *" The Tax Court quoted this statement with approval (R. 48a). This Court cited *Ackerman* and other cases in *Helvering* v. *LeGierse*, 312 U. S. 531, not in approval of the foregoing statement as

erroneously implied by the Commissioner, but merely for the proposition that a single premium life policy purchased in conjunction with an annuity contract was not truly an insurance policy because it did not contain the elements of risk-shifting and risk-distributing essential to life insurance contracts.

Further, the Commissioner, in asserting that proceeds of policies of this nature payable by reason of accidental death are subject to the tax because of the Congressional policy which seeks, as a general matter, to bring into the gross estate all items of value owned by the decedent, or over which he exercised control during his life is contrary to the expressions of Congressional intent set forth in the opinion below (Petition, p. 14-15).

Moreover, the statutory language does not clearly and specifically include proceeds of airplane accident coverage. If Congress wishes to include such proceeds, it may accomplish this by simple amendment of the statute. But this Court can not be asked, as the Commissioner does, to rewrite the statutory clauses to include "*every* form of insurance compensation for the loss of life of the insured" (Italics ours) (see Petition, p. 5) when the words used in the statute are "* * * the amount receivable * * * under policies on the life of the decedent * * *". The difference in meaning between what the Commissioner suggests was the intention of the statutory wording and the words actually used is glaring.

The purpose of subjecting to the estate tax the proceeds of life insurance policies payable to specific beneficiaries was to obviate a method, directed at persons of wealth, of creating a substantial estate through the purchase of life insurance which would pass free of the tax. Certainly, the taxation of insurance proceeds arising solely by reason of accidental death was not the aim or intention of Congress.

If the general proposition concerning the policy of Congress asserted by the Commissioner were true, then it would appear that, at best, the portion of a tort claim at law for wrongful death attributable to the pain and suffering of the decedent prior to his demise would be taxable. Indeed, the Court below, in tracing the history of the revenue acts relating to taxation of the proceeds of life insurance policies and the expressions of Congressional intent in respect thereto noted that the purpose was "to foreclose resort to the purchase of life insurance as a means of tax avoidance" (Petition, p. 15). Certainly, the purpose in purchasing flight insurance cannot be said to be a tax avoidance scheme. More truly, in this instance, the purpose could have been to insure against an accidental death during an international flight where the recovery for a wrongful death against the carrier is sharply limited and circumscribed by the provisions of the Warsaw Convention. See *Block* v. *Compagnie Nationale Air France,* N. D. Georgia (1964) 229 F. Supp. 801.

It should be noted, in passing, contrary to the assertion in footnote 4 page 6 of the Petition, the Third Circuit did not find that decedent had retained incidents of ownership in the policies. The court below noted merely (Petition, p. 10) that the policies reserved to the assured the right to assign the policy or to change the beneficiary and that these were exercisable incidents of ownership. The Court of Appeals made no finding that decedent had retained these incidents of ownership nor did it indicate in any way its agreement with the finding of the Tax Court (R. 49a) that he did. In view of the result it reached, the Court of Appeals had no need to consider the claim and argument of the Executors that the decedent never did have, or, if he did have, he had effectively divested himself of all incidents of ownership (R. 7-19).

CONCLUSION

It is respectfully submitted that the petition for a writ of *certiorari* should be denied.

October 6, 1964.

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Attorneys for Respondents.

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No. 503

In the Supreme Court of the United States

OCTOBER TERM, 1964

COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

ESTATE OF MARSHAL L. NOEL, DECEASED, WILLIAM H. FRANTZ AND RUTH M. NOEL, EXECUTORS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 503

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The findings of fact and opinion of the Tax Court (R. 38–47) are reported at 39 T.C. 466. The opinion of the Court of Appeals (R. 48–54) is reported at 332 F. 2d 950.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1964. (R. 54–55.) The petition for certiorari was filed on September 15, 1964, and was granted on December 7, 1964. (R. 55.) The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether payments made to the beneficiary of two flight accident insurance policies on account of the death of the insured were received "as insurance under policies on the life of the decedent" within the meaning of Section 2042 of the Internal Revenue Code of 1954 and hence were required to be included in the decedent's gross estate for estate tax purposes.

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of the Internal Revenue Code of 1954 and of the Treasury Regulations issued thereunder are set forth in the Appendix, *infra*, pp. 16–17.

STATEMENT

On the evening of June 19, 1956, decedent's wife, Ruth M. Noel (hereinafter sometimes referred to as Ruth), drove her husband by automobile from their home to New York International Airport where he was to board an airplane bound for Venezuela. Just prior to taking off, decedent applied for two flight insurance policies, each in the principal sum of $62,500, and each naming him as the person insured, at a booth maintained for the sale of such policies by Airport Sales Corporation, a sales agent. Decedent made separate written applications for each policy: one, for a policy in which Continental Casualty Company was the insurer; the other, for a policy in which The Fidelity & Casualty Company of New York was the insurer. (R. 39.) Both applications named Ruth as the beneficiary, and stated that the trip to be covered by the insurance was a round-

trip flight from New York, New York, to Puerto Ordaz, Venezuela. The premium paid for each policy was $2.50. After the applications were signed by the decedent, he gave them to the sales clerk who validated them. Upon the decedent's instructions, the clerk then handed the policies to Ruth who kept them in her custody until after her husband's death. (R. 40.)

Each policy provided for payments by the insurer in specified amounts if certain bodily injuries were sustained by the insured as a result of an accident while a passenger on the round-trip flight, and each policy also provided for payment of the principal sum ($62,500) in the event of loss of life in such an accident. In addition, each policy reserved to the insured the right to assign the policy and to change the beneficiary without the consent of the beneficiary originally designated. (R. 40–41.)

Less than three hours later, at 12:31 a.m., E.S.T., on June 20, 1956, the airplane on which decedent was a passenger crashed into the Atlantic Ocean and all aboard were killed. On June 25, 1956, decedent's wife filed a claim for the amounts due under the two policies and in due course received the principal sums totaling $125,000. (R. 42.) This amount was not included in decedent's gross estate in the estate tax return filed by the executors of his will. The Commissioner of Internal Revenue determined that the proceeds of the policies should be included, and the Tax Court sustained that determination. (R. 38–47.) The Court of Appeals reversed. (R. 48–54.)

ARGUMENT

THE PAYMENTS MADE TO THE BENEFICIARY OF TWO FLIGHT ACCIDENT INSURANCE POLICIES ON ACCOUNT OF THE DEATH OF THE INSURED WERE RECEIVED "AS INSURANCE UNDER POLICIES ON THE LIFE OF THE DECEDENT" WITHIN THE MEANING OF SECTION 2042 OF THE INTERNAL REVENUE CODE OF 1954

INTRODUCTION

Section 2042 of the Code includes in the estate of a decedent amounts receivable "as insurance under policies on the life of the decedent." Similar provisions have been in the revenue laws since 1918. In 1929, the Board of Tax Appeals held in *Ackerman* v. *Commissioner,* 15 B.T.A. 635, that proceeds of accident policies and double indemnity life insurance policies were amounts received "as insurance under policies taken out by decedent upon his own life," and were thus includible in decedent's taxable estate under the Revenue Act of 1924. The *Ackerman* decision has been cited with approval by this Court, has been universally considered sound by commentators, has been the basis of a consistent administrative interpretation of the statute for thirty-five years, and has never been questioned by Congress in the several reenactments of the provision involved. If there is to be a change in the law at this late date it should come from legislative action rather than *de novo* judicial re-examination of the question.

Overturning this long-standing interpretation, the Court of Appeals held that flight accident insurance was not life insurance because under life insurance the insurer "agrees to pay a specified sum upon the occurrence of an inevitable event," whereas accident in-

surance covers a risk "which is evitable and not likely to occur." (R. 51.) The language of Section 2042, its legislative history, and, most important, its place in the overall plan of the federal estate tax all confirm the correctness of the *Ackerman* decision. Acceptance for estate tax purposes of the Court of Appeals' distinction between insurance against avoidable and inevitable events would, moreover, result in the exclusion from the estate tax of such widely used instruments of estate planning as double indemnity and term insurance and would defeat the manifest intention of Congress to tax all wealth the disposition of which is controlled by the decedent at his death.

A. THE *ACKERMAN* DECISION, HOLDING THAT THE PROCEEDS OF AN ACCIDENT INSURANCE POLICY PAYABLE BECAUSE OF THE DEATH OF A DECEDENT ARE INCLUDIBLE IN HIS GROSS ESTATE, HAS BECOME AN ESTABLISHED PART OF THE LAW OF FEDERAL ESTATE TAXATION

Section 2042(2) of the Internal Revenue Code of 1954, App. *infra*, p. 16, provides that the proceeds of "insurance under policies on the life of the decedent" are includible in the decedent's gross estate if he "possessed at his death any of the incidents of ownership." This provision reflects the present formulation of a congressional policy with respect to insurance that was first introduced into the revenue laws by Section 402(f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098. The scope of the section's coverage was settled by the Board of Tax Appeals in 1929 in *Ackerman* v. *Commissioner*, 15 B.T.A. 635, which held that proceeds of accident policies and double indemnity life insurance policies paid by reason of accidental death were paid pursuant to "insurance under policies taken

out by the decedent upon his own life", within the meaning of Section 302(g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304–305. The conclusion of the Board of Tax Appeals that the statute covered all insurance risks as to which payment is "contingent upon the loss of life" (15 B.T.A. 635, 637) has been accepted as correct and has not been challenged for thirty-five years.

The decision in *Ackerman* in 1929 has been the basis of a consistent and long standing Treasury interpretation of the statute and of the Treasury Regulations on Estate Tax, Section 20.2042–1(a) of which now provides that the "term 'insurance' refers to life insurance of every description."[1] Since 1929 this Court has cited the *Ackerman* decision with approval in *Helvering* v. *Le Gierse,* 312 U.S. 531, 539, and it has been accepted unqualifiedly by such recognized authorities on estate taxation as Lowndes and Kramer, *Federal Estate and Gift Taxes* (1962 ed.), pp. 290–291; 1 Paul, *Federal Estate and Gift Taxation* (1942), pp. 507–508; 2 Mertens, *Law of Federal Gift and Estate Taxation* (1959 ed.), p. 340; 4 Rabkin & Johnson, *Federal Income Gift and Estate Taxation* (1964 ed.), pp. 6167–6168; and Clark, *Taxation of Life Insurance and Annuities* (1941 ed.), p. 82. The construction announced in *Ackerman* has been widely publicized in the textual comments of the leading tax reference

[1] See also Treasury Regulations 105 (1939 Code), Sec. 81.25; Treasury Regulations 80 (1934 ed. and 1937 ed.), Art. 25; Treasury Regulations 70 (1926 ed. and 1929 ed.), Art. 25; Treasury Regulations 68 (1924 ed.), Art. 25; Treasury Regulations 63 (1922 ed.), Art 27; and Treasury Regulations 37 (1921 ed.), Art. 32.

section has been reenacted, and amended in other re-

works. Prentice-Hall *Federal Taxes, Estate and Gift Taxes*, par. 120,427.2, and 1 Commerce Clearing House, *Federal Estate and Gift Tax Reporter*, par. 1650.05. Finally, Congress has never attempted to limit the scope of the *Ackerman* decision or the established administrative interpretation of the statute, although the spects, on a number of occasions.[2] Such long standing interpretations continued without change and applying to substantially reenacted statutes are generally deemed to have received congressional approval and have the effect of law. Cf. *Helvering* v. *Winmill*, 305 U.S. 79, 83; *United States* v. *Dakota-Montana Oil Co.*, 288 U.S. 459, 466, and *Boehm* v. *Commissioner*, 326 U.S. 287, 291–292. In short, the *Ackerman* decision has become an established part of the fabric of the law of federal estate taxation.

B. THE HISTORY OF SECTION 2042 AND ITS ROLE IN THE OVERALL PLAN OF ESTATE TAXATION SHOW THAT IT IS INTENDED TO BRING INTO THE GROSS ESTATE ALL PROCEEDS OF ANY FORM OF INSURANCE OWNED OR CONTROLLED BY THE INSURED AND PAYABLE BY REASON OF HIS DEATH

Section 2042 of the Internal Revenue Code of 1954 is one of a number of provisions defining the gross estate of a decedent in such a way as to make taxable the full value of any property controlled by a decedent and received by reason of his death. The provisions, found in Sections 2033 to 2042 of the Code, are intentionally all-encompassing, reaching every disposition

[2] Section 2042 was first enacted as Section 402(f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098. This section was reenacted in Section 402(f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278–279; in Section 302(g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304, 305, and the Revenue Act of 1926, c. 27, 44 Stat. 9, 70–71; and in Section 811(g) of the Internal Revenue Code of 1939.

which, as a matter of economic reality, is testamentary and was subject to the decedent's control. The statute reaches not only property owned by the decedent at death but also, in certain circumstances, property which was disposed of by the decedent prior to his death (26 U.S.C. 2035–2040) and property which the decedent never owned outright but which was completely subject to his disposition at death (26 U.S.C. 2041). Like other property subject to the decedent's control at death, the proceeds of "insurance under policies on the life of the decedent" are included in the gross estate if the decedent retains the right to control their disposition through his possession of any "incidents of ownership" of the policies (26 U.S.C. 2042).

Section 2042 of the Code performs an integral role in accomplishing the congressional purpose of taxing the full value of property received by reason of the death of a decedent who had the power to control the disposition of the property at the time of his death. It was added, along with the predecessor of Section 2041, by the Revenue Act of 1918. With respect to the inclusion in the gross estate of property over which the decedent had a general power of appointment, the House Committee Report stated (H. Rep. No. 767, 65th Cong., 2d Sess., pp. 21–22 (1939–1 Cum. Bull. (Part 2), 86, 101)): "The possessor of the power has full authority to dispose of the property at his death, and there seems to be no reason why the privilege which he exercises should not be taxed in the same degree as other property over which he exercises the same authority." The same considerations applied to life insurance owned by the decedent. The Commit-

tee Report indicated concern over the fact that insurance proceeds payable to specific beneficiaries were outside of the decedent's taxable estate even though such proceeds represented the transfer of wealth controlled by the decedent during his life and which was received by others as a result of his death. Accordingly, Section 402(f) was added to the Internal Revenue Code to include in the gross estate the proceeds of "insurance under policies taken out by the decedent upon his own life."

The taxation of death benefits under insurance contracts remained unchanged until the Revenue Act of 1942, Section 404, 56 Stat. 798, amending Section 811 (g) of the Internal Revenue Code of 1939. In that act, the definition of the gross estate was changed to substantially its present form, which includes the proceeds of insurance to the extent that the decedent possessed any of the incidents of ownership of the policy at the time of his death.[3] In the Internal Revenue Code of 1954, to place insurance in an "analogous position to other property," Congress specified that a reversionary interest in the decedent was an incident of ownership if it was worth in excess of five per cent of the value of the policy at the time of decedent's death.

Both the history of the section and its present function in the estate tax show that Section 2042 was intended to make taxable the transfer of wealth by

[3] The 1942 Act also added a "premium payment" test of includibility which was later eliminated by Section 2042 of the Internal Revenue Code of 1954. See H. Rep. No. 1337, 83d Cong., 2d Sess., p. 91.

means of any and all forms of insurance "policies on the life of the decedent" which the decedent owned or controlled at the time of his death just as the preceding provisions of the statute make taxable the transfer of wealth under any and all other forms of disposition of property owned or controlled by the decedent. It is, moreover, plain in this case that the decedent retained sufficient "incidents of ownership", within the meaning of that phrase in Section 2042, to require inclusion of the proceeds in the decedent's gross estate if they were paid pursuant to "insurance under policies on the life of the decedent." (R. 43–47, 49.) Decedent had the right to receive substantial payments in the event of bodily injury resulting from an airplane accident. Each policy also reserved to the decedent the right to change the beneficiary, an incident of ownership sufficient in itself to bring the policy proceeds into the decedent's gross estate. See, *e.g., Chase Nat. Bank* v. *United States,* 278 U.S. 327; *Fried* v. *Granger,* 105 F. Supp. 564, 567 (W.D. Pa.), affirmed on the opinion of the District Court, 202 F. 2d 150 (C.A. 3); *Singer* v. *Shaughnessy,* 198 F. 2d 178, 181 (C.A. 2); Treasury Regulations on Estate Tax (1954 Code), Section 20.2042–1(c)(1); S. Rep. No. 1631, 77th Cong., 2d Sess., p. 235 (1942–2 Cum. Bull. 504, 677); H. Rep. No. 2333, 77th Cong., 2d Sess., p. 163 (1942–2 Cum. Bull. 372, 491–492). Thus the sole question in the present case, as in *Ackerman,* is whether the statute's purposes and language dictate or admit of an exception excluding from the gross estate the proceeds of policies on the life of the decedent which are payable only in the event of

death by certain specified causes (*e.g.*, any accident, or airplane accident, or particular diseases) or in the event of death within a certain limited period of time (*i.e.*, term insurance).

As the Board of Tax Appeals noted in the *Ackerman* case (15 B.T.A. 635, 638), Congress has chosen the broadest possible language in defining the coverage of insurance proceeds in the estate tax; the gross estate now includes "the value of all property * * * [t]o the extent of the amount receivable by [any] beneficiaries as insurance under policies on the life of the decedent" (Section 2042). The language itself admits of no distinction between "policies on the life of the decedent" which are payable in all events and those payable only if death is caused by certain enumerated events.

A contrary interpretation, moreover, would not only be inconsistent with the established interpretation of the narrower language of related income tax provisions but would, by overturning that interpretation, produce anomalous and undesirable tax consequences. Section 101 of the Internal Revenue Code of 1954 excludes from gross income death benefits paid "under a life insurance contract." Section 1.101-1(a) of the Treasury Regulations on Income Tax specifically provides that "Death benefit payments having the characteristics of life insurance proceeds payable by reason of death under contracts, such as * * * accident and health insurance contracts, are covered by this provision." *Infra*, p. 17. *A fortiori* the same should be true of the broader language of Section 2042. Indeed, if, as the Court of Appeals has held, the phrase "insurance under policies on the life of the

decedent" is not broad enough to encompass death benefits paid under accident policies, it would seem to follow that such benefits would also be outside the more restricted definition of "life insurance" in Section 101, and the exclusion granted the decedent's estate would be at the expense of the beneficiary who would then be subject to an income tax liability on the policy proceeds.

While it may be reasonable to treat life insurance differently from health-and-accident insurance for purposes of dealing with the company engaging in the business (and this is done by State regulatory agencies and the federal income tax), there is no justification for making the estate tax treatment of the death benefits received by a beneficiary from policies owned by the decedent depend upon the nature of the insurer's business or whether the policies insured against all causes of death or only some causes. It is, of course, true that ordinary life insurance—unlike insurance against only certain causes of death—has a significant "savings" aspect, so that frequently the proceeds of ordinary life insurance represent, in large part, property accumulated by the insured during his lifetime. By the same token, the possibilities of tax avoidance through investing accumulated property in ordinary life insurance are far greater. But neither of these differences of degree bears upon the fundamental policy of the estate tax: to tax the full value of any property received by reason of the death of a decedent who enjoyed the right to control its disposition at death.

This basic policy is particularly evident in Section 2042, for the tax is on the proceeds of insurance, not on the premiums paid for it or its cash surrender value. The proceeds of a policy payable only in the event of accidental death are as fully received from a decedent who controlled their disposition as are the proceeds of any other policy "on the life of the decedent." Moreover, every form of insurance on the life of the decedent involves the possibility that for a small expenditure the decedent may transfer substantial amounts of wealth and thereby greatly increase the gross estate which is measured by the proceeds of insurance, not by the decedent's contribution. But it has never been supposed that the proceeds of an ordinary life insurance policy would be excluded from the estate of a decedent who lost his life after making only one premium payment.

To be sure, the disparity between the decedent's contribution and the policy proceeds is likely to be greater where the policy insures against death from only a limited number of causes or for only a limited time. If the different policies were arrayed according to the risks assumed by the insurer, ordinary life insurance, with or without double-indemnity provisions, might appear at the opposite end of the spectrum from specific trip-flight accident policies. Term insurance with renewable features, ordinary term insurance, and general accident policies with death benefit provisions are examples that would fall somewhere in between. But the difference in the degree of risk, and thus of the disparity between premiums paid and benefits realized, is irrelevant to the purpose of the statute to tax the

value of any property subject to the decedent's control which is received by reason of his death. And it is indisputably clear that the language chosen by Congress neither suggests any intention of distinguishing among these forms of insurance nor furnishes any guidelines to the courts in drawing the lines that would be required if the statute covered the proceeds of some but not all "policies on the life of the decedent."

Finally, adoption of a distinction, such as that created by the court below, between "policies on the life of the decedent" which are inevitably payable and those which are not would exclude from the gross estate not only the proceeds of general accident policies and part of the proceeds of double-indemnity life insurance policies paid by reason of death (which were expressly discussed by the court), but also such conceded forms of life insurance as term insurance payable only in the event that the insured dies within a specified period of time. We submit that Congress plainly had no such intent. Insurance policies whose proceeds are payable by reason of the death of the insured are essentially testamentary in character, and regardless of whether the risk assumed by the insurer is an unlikely or "inevitable" one, the maturation of the beneficiary's right to the proceeds attributable to the death of the insured is an appropriate occasion for the exaction of an estate tax. *United States* v. *Manufacturers Nat. Bank*, 363 U.S. 194; *Chase Nat. Bank* v. *United States*, 278 U.S. 327.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1965.

APPENDIX

STATUTES AND REGULATIONS INVOLVED

1. ESTATE TAX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

> SEC. 2042. PROCEEDS OF LIFE INSURANCE.
>
> The value of the gross estate shall include the value of all property—
>
> (1) *Receivable by the executor.*—To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.
>
> (2) *Receivable by other beneficiaries.*—To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. * * *

Treasury Regulations on Estate Tax (1954 Code):

> SEC. 20.2042–1. Proceeds of life insurance—(a) *In general.* (1) Section 2042 provides for the inclusion in a decedent's gross estate of the proceeds of insurance on the decedent's life (i) receivable by or for the benefit of the estate (see paragraph (b) of this section), and (ii) receivable by other beneficiaries (see paragraph (c) of this section). The term "insurance" refers to life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge system.
>
> * * * * * *

2. INCOME TAX

Internal Revenue Code of 1954 (26 U.S.C., 1958 ed.):

SEC. 101. CERTAIN DEATH BENEFITS.

(a) *Proceeds of Life Insurance Contracts Payable by Reason of Death.*—

(1) *General Rule.*—Except as otherwise provided in paragraph (2) and in subsection (d), gross income does not include amounts received (whether in a single sum or otherwise) under a life insurance contract, if such amounts are paid by reason of the death of the insured.

* * * * *

Treasury Regulations on Income Tax (1954 Code):

SEC. 1.101–1 *Exclusion From Gross Income of Proceeds of Life Insurance Contracts Payable by Reason of Death.*

(a) *In General.* * * * Death benefit payments having the characteristics of life insurance proceeds payable by reason of death under contarcts, such as workmen's compensation insurance contracts, endowment contracts, or accident and health insurance contracts, are covered by this provision. * * *

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 503

COMMISSIONER OF INTERNAL REVENUE,
Petitioner

vs.

ESTATE OF MARSHAL L. NOEL, Deceased, WILLIAM H. FRANTZ and RUTH M. NOEL, Executors,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Certiorari Granted December 7, 1964

BRIEF FOR RESPONDENTS

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Errata

We wish to call to the Court's attention the following typographical errors discovered in Respondent's Brief after final printing.

P. 2, 2nd paragraph, line 4—should read:

sued annually) are subject to the approval of state insur-

P. 5, top line—should read:

system . . ." *Treasury Regulations* (1954), Sec. 20.2042-4.

P. 8, 1st paragraph, line 3—should read:

ministrative interpretation to cast these principles aside

P. 10, last paragraph. line 9—should read:

able, Rev. Rul. 5754 (1957), 1 C. B. 298; proceeds of a policy

Respectfully submitted,

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Counter-Statement of Questions Presented

1. Are single trip airplane accident insurance policies which insure against loss of limbs, eyes or life by reason of airplane accident "policies on the life of the decedent" within the meaning of Section 2042(2) of the Internal Revenue Code of 1954?

2. Is a printed provision in a single trip airplane accident insurance policy reserving to the decedent the right, unexercisable on any practical basis, to change the named beneficiary an incident of ownership possessed or exercisable by decedent within the meaning of Section 2042(2) of the Internal Revenue Code?

Counter-Statement

Insofar as petitioner's Statement recites the facts of this case, respondents shall, for the sake of brevity, accept it. The following facts essential to a clear understanding of the case, however, were omitted by petitioner.

Neither of the insurance companies issuing the policies herein were authorized to issue life insurance policies. The policies themselves (of which some 7 or 8 million are issued annually are subject to the approval of state insurance commissions as accident and health coverage and are so considered by the insurance industry (R. 12, 13, 14).

The printed provisions of the policies, which included a reservation by the insured of a right to change the beneficiary, conditioned any change upon both the approval by an executive officer of the insurance company and the endorsement on the policy of any change (R. 31, 35). No such officer was present at the airport (R. 15) and no machinery was there provided by which decedent could delete or change any provisions in the policies (R. 12).

The uncontradicted testimony[1] of decedent's widow established that she paid the premium for each policy (R. 17, 25). The policies were at all times in the possession of decedent's wife and decedent disclaimed any interest therein (R. 18).

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[1] The Tax Court made no finding on this point (R. 45). On appeal, the Court of Appeals accepted her testimony (R. 49).

ARGUMENT

POINT I

Proceeds from single trip airplane accident insurance were not received as insurance under policies on the life of the decedent.

A. The legislative history of Section 2042 precludes holding that Congress intended accident insurance proceeds to be included for estate tax purposes.

The Estate Tax as we know it was first established by Congress in the Revenue Act of 1916. It made no mention of life insurance. Except for life insurance payable to the executor in his fiduciary capacity, life insurance proceeds were not includible. Revenue Act of 1916, 39 Stat. 777 and 778.

The tax has been characterized as an excise "tax on the right to transmit" property from the dead to the living. *New York Trust Co.* v. *Eisner*, 256 U. S. 345, 349.

Life insurance payable to a specific beneficiary other than the estate was first taxed in 1918 by the enactment of §402(f) of the Revenue Act of 1918, 40 Stat. 1097, 1098, which read, in pertinent part, as follows:

> "That the value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated . . .
>
> • • • •
>
> "(f) To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess of $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life."

This language was not changed[2] until it was amended by §404(g) of the Revenue Act of 1942, 56 Stat. 944, Internal Revenue Code of 1939 (26 U. S. C. §811(g)). The amendment abolished the $40,000. exemption and established as tests for includibility the payment of premiums or the possession by the decedent of "incidents of ownership". The next relevant amendment came with the Internal Revenue Code of 1954. The provision relating to the payment of premiums by decedent-insured was removed, and the applicable law, which was in effect on decedent's death on June 20, 1956 and so remains to this day, is Section 2042. It reads, in pertinent part, as follows:

> "(2) Receivable by other beneficiaries. —To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person, * * *"

Thus, the statutory language in question—"insurance under policies on life of the decedent" in the present Act is substantially unchanged from its original introduction in 1918. This language has never been defined by any of the Revenue Acts.[3] Over the years the treasury regulations have defined the term "insurance" as ". . . life insurance of every description, including death benefits paid by fraternal beneficial societies operating under the lodge

---

[2] Revenue Act of 1921, C. 136, 42 Stat. 227, Sec. 402 (f); Revenue Act of 1924, C. 234, 43 Stat. 253, Sec. 302(g); Revenue Act of 1926, C. 27, 44 Stat. 9, Sec. 302(g).

[3] In *Walker* v. *U. S.*, 83 F. 2d 103 (8th Cir. 1936), the Court found this statutory language to be ambiguous, and this Court in *Helvering* v. *LeGierse*, 312 U. S. 531, noted "the curious consistency and inadequacy of section 302 (g)."

system . . .." *Treasury Regulations* (1954), Sec. 20.2042-1.[1] "Accident insurance" is not mentioned. The court below found the regulations to be of little help in amplifying and interpreting this section (R. 49).

The legislative history of this language which does not even mention accident policies sheds considerable light on the meaning Congress intended measured by the mischief sought to be corrected and the end sought to be achieved thereby. *Harrison* v. *Northern Trust Co.*, 317 U. S. 476, 479-480; *J. C. Penney Company* v. *C.I.R.*, 312 F. 2d 65, 68 (2d Cir. 1962).

Under the 1916 Revenue Act, life insurance payable to designated beneficiaries was not taxed. It soon came to the attention of Congress that persons of wealth could and were avoiding the estate tax by investing large sums of money in life insurance payable to persons other than their own estates. Congress cut off this escape by means of the Revenue Act of 1918, §402(f), *supra*. The report of the House Committee on Ways and Means (Revenue Act of 1918, 65th Congress, 2d Session, House Report 767, p. 22), which the Court below set forth at some length (R. 53), stated the purpose of Section 402(f) and brought the Court to the conclusion:

> "The obvious intent of Congress and the purpose of the enactment was to foreclose the possibility of tax avoidance under the existing law." (R. 53).

The Congressional purpose of preventing estate tax avoidance in respect to property of the decedent is fur-

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[1] Treasury Regulations 37 (1921 ed.), Art. 32; Treasury Regulations 63 (1922 ed.), Art. 27; Treasury Regulations 68 (1924 ed.), Art. 25; Treasury Regulations 70 (1926 ed.), Art. 25; Treasury Regulations 70 (1929 ed.), Art. 25; Treasury Regulations 80 (1934 ed.), Art. 25; Treasury Regulations 80 (1937 ed.), Art. 25.

ther demonstrated by the other provisions included in §§2035-2043 of the Code. These seek to recoup for estate tax purposes various interests, transfers and dispositions removing from the estate property otherwise includible therein under the definition of "gross estate" in §2033.

Enactment of these sections, each, with the exception of §2039 (concerning annuities), directed at specific dispositions of decedent's interests, should not compel extension of a blanket inclusion to even those instances where a similar purpose is not served.

The 1916 Revenue Act and subsequent enactments, including the above cited provisions, have been aimed at taxation of the decedent's actual estate, including those dispositions which are, as petitioner states, "as a matter of economic reality . . . testamentary . . . and subject to the decedent's control". (Brief p. 8). In reference to enactments subsequent to the Revenue Act of 1916, "it could be plausibly maintained that the greater part of the changes . . . made, apart from the different rates in effect, were devised to prevent circumvention of its general provisions". Montgomery's Federal Taxes, Estates, Trusts and Gifts (1949-50), p. 440-441. Thus, life insurance policies, because they might be, and were, used to transfer actual portions of the estate, were specifically included by §402(f) in 1918.

Petitioner could not and does not contend that single trip airplane accident policies could be used as instruments of tax avoidance or be of use in estate planning. The concept of avoidance necessarily implies a conscious, purposeful attempt to transfer wealth without the imposition of the tax. To say that the payment of an indemnity for loss of life under an accident policy on which no tax will fall is an avoidance is to suggest the purchase of the policy was in anticipation of death by accidental means so that wealth

would be transferred free of tax. Insurance of this type has no place within the legitimate sphere of arranging one's affairs to minimize tax obligations. The very uncertainty of the event—accidental death—precludes the use of accident insurance as an estate planning tool. Since the avowed Congressional purpose was to shut the door on a method of "defeating the estate tax" it cannot reasonably be inferred Congress also intended to place in the same category an indemnity under a policy of the type with which we are here concerned. The concepts of "accident" and "purposeful defeat of the tax" are incompatible.

B. The construction of the language of Section 2042 precludes subjecting proceeds of aviation accident policies to the estate tax.

Since the language used in Section 2042(2) is not defined, under the settled rules of statutory construction it must be given its ordinary, plain and generally accepted meaning, *Hanover Bank* v. *Commissioner*, 369 U. S. 672, 687; *Crane* v. *Commissioner*, 331 U. S. 1, 6; *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560.

In the event of an ambiguity, any doubt existing as to its construction should be resolved in favor of the taxpayer, *Hassett* v. *Welch*, 303 U. S. 303, 314, or, at least the Court should determine what a fair construction would be, *White* v. *United States*, 305 U. S. 281.

Respondents contend that the ordinary, plain and generally accepted meaning of "insurance under policies on the life of the decedent" under any fair, reasonable construction of those terms would not and does not encompass the single trip airplane accident policies here involved. The plain meaning of life insurance does not include accident insurance nor does accident insurance mean life insurance. See the opinion of the Court of Appeals below at R. 50-51 and authorities cited therein.

Nevertheless, the Court is being urged, on the basis of *Ackerman* v. *Commissioner*, 15 B.T.A. 635 (1929) and administrative interpretation to cast three principles aside and to engraft onto the statute the proceeds of policies here involved on the asserted basis of an all pervading Congressional intent.

The effect, however, if petitioner's position were to be accepted would be to excise from the statute the phrase "policies on the life" and render it surplusage.

The question posed by the instant matter is not, as suggested by Petitioner, whether the statute's purpose and language admit of an "exception" excluding from the gross estate proceeds of policies similar to those here considered. (Brief pp. 10-11). Rather, the inquiry concerns the precise extent to which Congress intended to add to the gross estate for tax purposes something not previously included therein, and more specifically, whether proceeds from flight accident policies should be included "as insurance under policies on the life of the decedent," within the meaning of §2042. But for that section, life insurance paid to a designated beneficiary would not be taxable.

Thus viewed, a reading of the statute indicates, at least that Congress did not specifically include proceeds from flight accident policies. "At no place does the statute attempt any definition of the term 'life insurance', though a glance at any insurance textbook would have indicated the necessity for such a definition if a tax-paying public was to be informed of its rights and obligations." *Paul, Life Insurance and Federal Estate Tax*, 52 Harv. L. Rev. 1037, 1057 n. 58 (1939). See *Helvering* v. *Le Gierse*, 312 U. S. 531, 539 n. 4.

Utilizing principles of statutory construction and considering the manifest distinction between life insurance and accident insurance, as was done by the Court of Appeals

below (R. 50-51), logically compels the finding that accident insurance policies are not included within the statute as noted above. An examination of the legislative history leads to the same conclusion (R. 51-54).

House and Senate Committee reports explicitly revealing Congressional purpose are of "controlling importance" in determining the proper construction of provisions of the Internal Revenue Code. *Commissioner of Internal Revenue* v. *Bilder*, 369 U. S. 499, 503-504 (concerning medical care deduction). Further, construction of the provisions must be based upon an examination of the legislative history of the Code. *Id.* at 505.

The object of the intent of Congress in respect to §402 (f), as plainly stated in the House Report, is manifestly life insurance. Inclusion of accident policies within the intent of the statute should not be by implication, when the same is not supported by the expressed reason underlying enactment of the statute. This is particularly true here "in view of the familiar rule that tax laws are to be construed liberally in favor of taxpayers". *Porter* v. *Commissioner of Internal Revenue*, 288 U. S. 436, 442.

Certainly Congress is aware of the distinction between accident and life insurance. Under §79 of the Code "group-term life insurance on the life of an employee", is not, according to the House-Senate Conference Committee Report, intended to include the death benefits in so-called travel insurance or accident and health policies, where such policies do not provide general death benefits. (This section was added by §204 (a)(1) of the Revenue Act of 1964 to tax to a specified extent as income to an employee the cost of group-term life insurance policies.)

While not controlling, use of the term "life insurance" with reference to §2042 by the Committee reports for the 1954 Code, H. R. Rep. No. 1337, 83d Cong. 2nd Sess. A 316

(1954), S. Rep. No. 1622, 83d Cong. 2nd Sess. 124 (1954), would indicate the intent of Congress to include life insurance policies under the ordinary definition of the term.

The difference between the two types of policies is recognized within the 1954 Code. See §§801; 4371 (2) and 4372 (b)(e). Proposed Treasury Regulations §179-1 (b)(i)(ii)(b), 29 Fed. Reg. 10516-17 (1964) evidence the intent of the Treasury Department itself to accept limited distinctions between the two types of policies. That the Treasury Department does not consider the terms interchangeable is indicated by its separate listings in IRS Document No. 5045 (12-64) pp. 5, 6.

The distinction between life insurance and accident insurance is further indicated by Treasury Regulation §1.101-1 (a) cited in the Appendix to petitioner's brief. That provides "death benefit payments having the characteristics of life insurance proceeds" are excluded from the income tax. Death benefits arising from accident and health insurance contracts, from endowment contracts and workmen's compensation are specifically enumerated as examples. Thus, the Regulation itself indicates that benefits arising from these types of contracts are excluded not because they *are* life insurance, but because they have "characteristics" of life insurance.

Petitioner urges that this Court interpret Sec. 2042 as requiring includibility of all insurance proceeds payable upon the death of the insured. Such interpretation is neither consistent with the language of the section nor administrative interpretations or adjudications. Thus, even proceeds from an insurance policy paid to the executor of decedent who lost his life in a plane crash where the policy provided for such payments upon death, was ruled not taxable. Rev. Rul. 5754 (1957), 1 C.B. 298; proceeds of a policy payable to a beneficiary upon suicide of the assured mea-

sured by the premiums paid, was held not to be insurance. *Chew* v. *Commissioner*, 148 F. 2d 76 (5th Cir. 1954), cert. den. 325 U. S. 882. If Congress wished to tax all proceeds and was able to constitutionally do so, it could have provided includibility for all proceeds payable under any policies of life or accident insurance or payments made upon death under any other type of agreement. This has not been done.

Bearing in mind the purpose of Congress in its inclusion of life insurance proceeds was to "foreclose the possibility of tax avoidance", to what extent may the purchase by a decedent of limited accident insurance policies be denominated a transfer or disposition of his estate, or, a means of estate tax avoidance? Yet, if a reason is to be found for inclusion of limited accident policies within the Congressional intent of §2042, it must be on this basis. They are not specifically included by the statute. Neither are they included through statutory construction, nor by the expressed intent of the House Committee Report.

Thus amounts recoverable by beneficiaries under workmen's compensation as death benefits, Rev. Rul. 56-637, C B 1956-2, p. 600; or under wrongful death statutes, Rev. Rul. 54-19 CB 1954-1 p. 179; as social security death benefits, ET 18 CB 1940-2 p. 285; and as Armed Forces Gratuity Pay, Rev. Rul. 55-581, CB 1955-2 p. 381 are not taxable.

The reasons for exclusion from the estate tax of these death benefits payable to specific beneficiaries apply also to the accidental death policy benefits here considered. However, the purpose motivating the inclusion of life insurance policies in the estate tax is completely absent when considered in relation to death benefits under accidental death policies as well as to the benefits mentioned above.

The Court of Appeals below, as the first appellate court to consider this problem, has held that *Ackerman* was decided erroneously. The petitioner in relying on *Ackerman* urges, in effect, that a bad case like good wine mellows with age. Moreover, *Ackerman* in relying upon *Logan* v. *Fidelity & Casualty Co.*, 146 Mo. 114 (1898) ignored later Missouri decisions which were contrary to *Logan*.[5]

Petitioner further urges that the continuing administrative interpretation of the statute in accordance with the *Ackerman* decision has gathered the force of law through the failure of Congress to limit that interpretation in the course of subsequent reenactments of the statute. It should be pointed out, however, that such reenactment, in the absence of controversy over the existing interpretation of the statute, has little significance. Hart & Sacks, Legal Process, 1401-02 (tent. ed. 1958). Further, it is obvious that Congress, particularly with respect to tax statutes, could not be familiar with, or aware of, all existing interpretations of each statute. Thus, it does not necessarily follow that reenactment incorporates the existing interpretation, whatever that happens to be. *Ibid.* And, the lack of Congressional attention to §2042 and its predecessors has heretofore been noted. See *Helvering* v. *Le Gierse*, *supra*, 312 U. S. at 539 n. 4.

It might further be noted that citation of *Ackerman* by the Court in *Le Gierse*, at 312 U. S. 539-40, noted by petitioner (Brief p. 6), was not on the precise issue before the Court in the instant case and in *Ackerman*, namely, wheth-

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[5] *Jones* v. *Prudential Insurance Co. of America*, 208 Mo. App. 679, 236 S. W. 429 (Ct. App., 1922); *Brunswick* v. *Standard Acc. Ins. Co.*, 278 Mo. 154, 213 S. W. 45 (1919); *Andrus* v. *Business Men's Acc. Assn.*, 283 Mo. 442, 223 S. W. 70 (1920); *Aufirchtig* v. *Columbian National Ins. Co.*, 298 Mo. 1, 249 S. W. 912 (1923).

er accident insurance policies are "policies on the life of decedent" within the meaning of §2042. The specific question in *Le Gierse* was whether the subject contracts were "insurance" by virtue of containing the elements of risk-shifting and risk-distribution that characterize it.

An examination of the authorities cited by petitioner (Brief p. 6) as indicating unqualified acceptance of *Ackerman*, discloses that those texts merely state the holding expressed there as they do with other decided cases. Neither does similar publicity afforded a reported case by tax reference works validate the law therein announced.

Petitioner asserts that the Court of Appeals' distinction of evitability between life insurance and accident insurance would remove from the estate tax "such widely used instruments of estate planning as double indemnity and term insurance" (Brief p. 5). While we seriously doubt the petitioner's claim that double indemnity is widely used in estate planning, his position is a perversion of the holding in the instant case. In the first place, the Court of Appeals carefully limited its decision to the flight policies in question by stating: "We are of the opinion, and so hold, that the term 'insurance under policies on the life of a decedent' does not comprehend insurance under accident policies of the kind here in question." The fact is that under a double indemnity policy the "risk" involved is nevertheless death and not "accident". The fact of accident merely determines the amount of payment. Secondly, the Commissioner's suggestion that the proceeds from term life insurance policies may be excluded is absurd. Term life insurance which matures upon death, regardless of cause, is just as effective a form of insurance on the life of decedent as ordinary, limited payment, or endowment life insurance. It has just nothing to do with accident insurance in this context.

C. Neither taxation policy nor constitutional limitations permit taxation of proceeds from single trip airplane accident insurance policy.

Taxation of the proceeds of the airplane accident would not further the purpose of the estate tax—the prevention of accumulated wealth being passed on, undiminished, from generation to generation. Thus, the graduated taxation of all property in which the decedent had an interest is employed to carry out the purpose. Also, transfer of any real interest in property whether by testamentary means or by legal devices analogous to testamentary disposition such as dower rights, joint tenancies, non-exercise of powers of appointment, are included.

It must be noted that in each of the above categories the decedent during his life owned a valuable asset which was transferred by his death. No case has been found in which this Court held that the estate tax could be constitutionally applied to any property having no substantial value during decedent's lifetime. To justify includibility, property of economic value must be owned or controlled by the decedent which is transferred by his death., *Lewellyn* v. *Frick*, 268 U. S. 238.

The mere receipt of property by a beneficiary upon a decedent's death does not, of itself, constitute a predicate for inclusion. The tax is not upon the receipt of property by a beneficiary but upon the transfer of property in which decedent owned or controlled a valuable interest when he died. *Walker* v. *U. S.*, 83 F. 2d 103, 110 (8th Cir. 1936).

In passing upon the constitutionality of the tax on life insurance proceeds, this Court, in *Chase National Bank* v. *U. S.*, 278 U. S. 327, held that where the decedent possessed economically valuable rights in life insurance policies, his death, by extinguishing those rights worked, in effect, a testamentary disposition.

Said the Court:

"A power in the decedent to surrender and cancel the policies, to pledge them as security for loans and the power to dispose of them and their proceeds for his own benefit during his life which subjects them to the control of a bankruptcy court for the benefit of his creditors (Cohen v. Samuels, 245 U. S. 50, 62 L. ed. 143, 38 Sup. Ct. Rep. 36; see Burlingham v. Crouse, 228 U. S. 459, 57 L. L. ed. 920, 46 L.R.A. (N.S.) 148, 33 Sup. Ct. Rep. 564), and which may, under local law applicable to the parties here, subject them in part to the payment of his debts (N. Y. Domestic Relations Laws, chap. 14; Consol. Laws, §52; Kittel v. Domeyer, 175 N. Y. 203, 67 N. E. 433; Guradian Trust Co. v. Straus, 139 App. Div. 884, 123 N. Y. Supp. 852, affirmed in 201 N. Y. 546, 95 N. E. 1129), is by no means the least substantial of the legal incidents of ownership, and its termination at his death so as to free the beneficiaries of the policy from the possibility of its exercise would seem to be no less a transfer within the reach of the taxing power than a transfer effected in other ways through death."

The kind of substantial interests in policies referred to by the Court cannot be equated to the incipient interest that the decedent may have had in the airplane flight policies here involved. He had nothing of value which was properly includible for estate taxation, regardless of whether or not he can be said to have retained a right to change the beneficiary in the policies.

The inherently speculative nature of these policies—the infinitesimal chance of an airplane accident—the almost minimal premium charged, remove it from the testamentary-like disposition of property required by this Court

for purposes of includibility. The actuarial statistics comparing total deaths with accidental deaths due to airplane accidents clearly substantiate this. In 1963, the death rate per 1000 population in the United States was 9.6.[6] By comparison, of some 77,430,000 commercial airplane passengers in 1963, a total of 264 fatalities were recorded.[7] Thus, the incidence of deaths due to an airplane accident as opposed to death by any means is 1 to 6867. The infinitesimal chance of death by reason of an airplane accident demonstrates the lack of value of decedent's interest in the policies.

Consistent with the primary intent to prevent untaxed transfer of substantial wealth, §2042(2) of the Internal Revenue Code of 1954 requires at least a 5% reversionary interest in a life insurance policy before it is taxed as a part of decedent's estate. When viewed even against this 5% interest standard, decedent's interest in these policies was for all practical purposes nil.

D. Airplane accident policies are not "policies on the life of the decedent".

The policies here considered—airplane accident insurance—indicate a purpose and coverage distinct from life insurance. Initially, it should be pointed out that in the insuring agreements, the hazard protected against is an accident (R. 31, 35); that the issuing companies are not authorized to sell life insurance (R. 12, 13); that a license is not required for an agent selling this type of coverage, although examination and licensing is required in the sale

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[6] Total number of deaths 1,813,000. Statistical Abstract of the United States (1964 ed.), p. 48.

[7] F.A.A. Statistical Handbook of Aviation (1964 ed.), pp. 121, 143.

of life insurance, *New York Insurance Law* §113 (3), 114 (3) (a); that neither the general public nor the insurance industry consider this type of insurance life insurance (R. 14), and that the underwriting principles involved in the two types of policies are totally different (R. 13, 14). In the instant policies no life insurance underwriting factors are present, such as the insured's age, health, hereditary background, moral status, temperance and occupation, obviously because the insurance company neither intended to, nor did issue "a policy on the life of the decedent." These policies were no more insurance "on the life of the decedent" than they were insurance on his feet, hands or eyes. Loss of life, feet, hands or eyes resulting from an accident merely established the measure of the indemnity.

It is certainty of payment which gives life insurance its substance and provides the basis of taxability. *Helvering* v. *Illinois Life Ins. Co.*, 299 U. S. 88, 91. "Death, the risk of life insurance, the event upon which the insurance money is payable, is certain of occurrence, the uncertainty of the time of its occurrence is the material element and consideration of the contract." *Ritter* v. *Mutual Life Insurance Company*, 169 U. S. 139, 158.

By way of contrast, liability under the policies here involved arises only upon the happening of an accident resulting in injury.

If decedent while enroute had died as a result of heart attack, disease or any other natural cause, typical insurance upon his life would have matured simply because of the fact of death, but regardless of death or injury, recovery under the instant policies was conditioned upon an unexpected happening—accident.

The fundamental differences between life and accident insurance are reflected not only in the different reasons

for which each is purchased, but in the inherent differences in the principles of coverage, and underwriting requirements. Not the least glaring of these differences is the comparison between the measured, inevitable and sure happening of death, and the highly speculative, evitable, uncertain occurrence of an accident. This sureness of death is accurately reflected in mortality and actuarial tables. The likelihood of death of any individual can be statistically computed and measured in dollars and cents. Thus every life insurance policy, be it term, limited payment, ordinary, or endowment, has a discernable value which is present from the moment the policy is issued. This value gives the assured an immediate and real asset over which he may exercise control. By way of contrast, an accident policy represents a gamble, without economic value, and is incapable of measurement or valuation. These fundamental differences require different tax treatment.

POINT II

Decedent possessed no exercisable incidents of ownership.

The Tax Court found that the printed provisions in the policies reserving to the insured the right to change the beneficiary were an incident of ownership which brought the policies within the provisions of Section 2042(2) (R. 42 to 47). The Court of Appeals, while acknowledging that the right of assignment and change of beneficiary were exercisable incidents of ownership within the meaning of the statute, made no finding that decedent did, in fact, have those rights (R. 49). It found the Tax Court decision rested solely on the *Ackerman* case (R. 50). Coming to the conclusion it did, the Court of Appeals had no occasion to consider respondents' argument below that decedent had no incidents of ownership in the policies.

Respondents contend that decedent's widow purchased the policies and was the contracting party with the carriers. In signing the application forms decedent was doing nothing more than was necessary to effectuate the insurance. That act was equivalent to the insured submitting to a necessary physical examination for the issuance of an ordinary life policy purchased by his wife over which she held all incidents of ownership. See *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed. Supp. 773 (Ct. Claims 1950).

Moreover, even if decedent by reason of the unwanted stereotype policy provision imposed upon him be deemed to have possessed the right to change the beneficiary, it was impossible in any practical way to have exercised said right and it was, therefore, a complete nullity.

The term "incidents of ownership" is not employed in the statute in a technical legal sense but in an economic sense. *Sen. Rep. No. 1631*, 77 Cong. 2d Sess., p. 235; *H. R. Rep.* 2333, 77 Cong. 2d Sess., p. 163; *26 C.F.R.* Sec. 2042-1(c)(2).

Here, by their terms, the policies reserved to the decedent the following "rights": (1) The right to surrender the policy; (2) the right to receive benefits in the event an accident resulted in injury other than loss of life; and (3) the right to change beneficiaries.

Respondents contend that exercisable incidents of ownership within the meaning of 2042 must be substantial and significant—not empty, illusory and valueless. Unless decedent possessed in the policies substantial and effective rights which were exercisable by him in a practical, realistic manner, the proceeds were not includible for tax purposes. *Lewellyn* v. *Frick*, 268 U. S. 238; *Chase National Bank* v. *U. S.*, 278 U. S. 327. The policies here considered by their nature were devoid of such valuable rights.

Under the policy provisions, the right to cancel or surrender lapsed upon the start of the flight. Even if decedent had such right before the flight, it expired when he boarded the plane.[8]

Nor was the assured's right to receive disability compensation such an incident of ownership as to require inclusion. This was not a right that could defeat the right of decedent's widow either as beneficiary or owner. The result of an accident being either injury or death is the determinent factor and thus death did not extinguish such right. It was extinguished by the accident.

Nor was the right to change the beneficiary exercisable in any practical way. It must be remembered that not all incidents of ownership dictate taxation but only those that are exercisable have such an effect. *Internal Revenue Code*, §2042(2).

The possession of an empty power which cannot be exercised is not a predicate for taxation. If Congress had intended all incidents of ownership to require taxation regardless of the practical substance, Sec. 2042(2) would not condition taxability on exercisability.

The mere fact that the printed form gave decedent this right is not of conclusive significance.[9] Courts have gone behind the printed forms to determine if the decedent really did have such rights.[10]

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[8] Decedent's wife couldn't surrender the policies which were in her possession for the same reason, and such right was not in existence at the time of decedent's death.

[9] Decedent could make no changes in the policy regarding this practically unexercisable right or in any other respect. (R. 12, 31, 35).

[10] *Estate of Edward Doerkin*, 46 B. T. A. 809 (1942); *Schlontalla* v. *Hickey*, 149 F. 2d 687 (2d Cir. 1945), cert. den. 326 U. S. 756; *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed Supp. 773 (Ct. of Claims, 1950); *District of Columbia* v. *Wilson*, 216 F. 2d 630 (D. C. Cir. 1954).

This is not a case where the purchaser had a choice in the provisions, but was relegated to the boiler-plate provisions as written.

The inflexible printed form was prepared by the insurance companies for their own purposes and without the consent of the decedent. *New York Insurance Law*, §164(3)(A)(12).

It is significant that the "boiler plate" reservation of the right to change the beneficiary is almost never exercised under the type of policy here involved. Of the millions of such policies sold each year, the President of the leading sales company for such policies testified he knew of no change of beneficiary and estimated, if any, fewer than 10 changes of beneficiary in the last thirteen years (R. 10, 11), —a maximum of 10 changes in almost 100,000,000 policies.

As the Court in *National Metropolitan Bank of Washington* v. *U. S.*, 87 Fed. Supp. 773 (Ct. of Claims 1950), aptly stated, at p. 776:

> "We are not willing to disregard the manifest substance for a technical legal shadow . . . a legal technicality is a two-edged sword. The Courts in many cases have rightly sought the substance in requiring the payment of taxes even though a frame-work of form would have indicated otherwise. If we look behind the form for the substance to prevent tax dodging we should do the same to prevent a wrong against the taxpayer."

Such a right was clearly without practical value. Being air borne, decedent would have been unable to exercise this right either alone or in conjunction with any other person, even if he wished so to do. He had no way of notifying the insurance companies or the beneficiary. Even if he could communicate his desires, it would be to no avail as it was

necessary, under the policies, to have this change *endorsed* upon the policies, and this was beyond his power or control. Nor may it be fairly contended that the "right" might have been exercised for him.

The cases such as *Estate of Edward L. Hurd* v. *C.I.R.*, 6 T.C. 819, aff'd. 160 F. 2d 610 (1st Cir. 1947); *In re Inman's Estate*, 18 T.C. 522, rev'd. on other grounds, 203 F. 2d 679 (2d Cir. 1953); *Estate of Virginia H. West* v. *C.I.R.*, 9 T.C. 736, aff'd. 173 F. 2d 505 (8th Cir. 1947), which have rejected a settlor-trustee's physical incompetence or mental incompetence to exercise certain rights under a trust as a reason for not including the trust funds within the settlor-trustee's gross estate, have no application here. In those cases, the rights possessed by the alleged incompetents could have been exercised by a guardian appointed by the Court. Here, the rights themselves could not be exercised, first because decedent was unable to do so at all times that the policies were operative and, secondly, because he could not comply with the required procedures. Nor could his wife. Since decedent's wife as owner had possession of the policies at all times, decedent was never in a position to defeat her rights and thus was never possessed of any incidents of ownership in the policies. *U. S.* v. *Burgo*, 175 F. 2d 196, (3rd Cir. 1949).

While the policy covered a return trip, it might be speculated whether decedent could conceivably change the beneficiary before making his return trip. It must be noted that not even the wife could effectuate such a change without endorsement on the policies. Nor is such speculation allowed because only the events occurring prior to decedent's death may be construed in determining the existence of a taxable interest. *Goldstone* v. *U. S.*, 325 U. S. 687, 693.

But any attempt on the part of decedent to change the beneficiary would fail because his wife owned and had possession of the policies—an ownership which she could legally enforce—and the policies were not available to decedent for endorsement or change.

CONCLUSION

For the above stated reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 1965.

SUPREME COURT OF THE UNITED STATES

No. 503.—October Term, 1964.

Commissioner of Internal Revenue, Petitioner, v. Estate of Marshal L. Noel, Deceased, William H. Frantz and Ruth M. Noel, Executors.	On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

[April 29, 1965.]

Mr. Justice Black delivered the opinion of the Court.

This is a federal estate tax case, raising questions under 26 U. S. C. § 2042 (2) (1958 ed.), which requires inclusion in the gross estate of a decedent of amounts received by beneficiaries other than the executor from "insurance under policies on the life of the decedent" if the decedent "possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person . . . ."[1] The questions presented in this case are whether certain flight insurance policies payable upon the accidental death of the insured were policies "on the life of the decedent" and whether at his death he had

[1] "§ 2042. Proceeds of life insurance.

"The value of the gross estate shall include the value of all property—

"(1) Receivable by the executor.

"To the extent of the amount receivable by the executor as insurance under policies on the life of the decedent.

"(2) Receivable by other beneficiaries.

"To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person . . . ."

reserved any of the "incidents of ownership" in the policies.

These issues emerge from the following facts. Respondent Ruth M. Noel drove her husband from their home to New York International Airport where he was to take an airplane to Venezuela. Just before taking off, Mr. Noel signed applications for two round-trip flight insurance policies, aggregating $125,000 and naming his wife as beneficiary. Mrs. Noel testified that she paid the premiums of $2.50 each on the policies and that her husband then instructed the sales clerk to "give them to my wife. They are hers now, I no longer have anything to do with them." The clerk gave her the policies, which she kept. Less than three hours later Mr. Noel's plane crashed into the Atlantic Ocean and he and all others aboard were killed. Thereafter the companies paid Mrs. Noel the $125,000 face value of the policies, which was not included in the estate tax return filed by his executors. The Commissioner of Internal Revenue determined that the proceeds of the policies should have been included and the Tax Court sustained that determination, holding that the flight accident policies were insurance "on the life of the decedent"; that Mr. Noel had possessed exercisable "incidents of ownership" in the policies at his death; and that the $125,000 paid to Mrs. Noel as beneficiary was therefore includable in the gross estate. 39 T. C. 466. Although agreeing that decedent's reserved right to assign the policies and to change the beneficiary amounted to "exercisable incidents of ownership within the meaning of the statute," the Court of Appeals nevertheless reversed, holding that given "its ordinary, plain and generally accepted meaning," the statutory phrase "policies on the life of the decedent" does not apply to insurance paid on account of accidental death under policies like those here. 332 F. 2d 950. The Court's reason for drawing the distinction was that under a life insurance

contract an insurer "agrees to pay a specified sum upon the occurrence of an *inevitable* event," whereas accident insurance covers a risk "which is *evitable* and not likely to occur." (Emphasis supplied.) 332 F. 2d, at 952. Because of the importance of an authoritative answer to these questions in the administration of the estate tax laws, we granted certiorari to decide them. 379 U. S. 927.

I.

In 1929, 36 years ago, the Board of Tax Appeals, predecessor to the Tax Court, held in *Ackerman* v. *Commissioner*, 15 B. T. A. 635, that "amounts received as accident insurance" because of the death of the insured were includable in the estate of the deceased.[2] The Board of Tax Appeals recognized that "there is a distinction between life insurance and accident insurance, the former insuring against death in any event and the latter . . . against death under certain contingencies. . . ." The Court of Appeals in the case now before us considered this distinction between an "inevitable" and an "evitable" event to be of crucial significance under the statute. The Board of Tax Appeals in *Ackerman* did not, stating "we fail to see why one is not taken out upon the life of the policy-holder as much as the other. In each case the risk assumed by the insurer is the loss of the insured's life, and the payment of the insurance money is contingent upon the loss of life." This view of the Board of Tax Appeals is wholly consistent with the language of the statute itself which makes no distinction between "policies on the life of the decedent" which are payable in all events and those payable only if death comes in a certain way or within a certain time. Even were the statutory language less

[2] Section 302 (g) of the Revenue Act of 1924, which was applicable in *Ackerman*, provided that the estate should include all proceeds receivable by other beneficiaries "under policies taken out by the decedent upon his own life." 43 Stat. 253, 304–305.

clear, since the Board of Tax Appeals' *Ackerman* case it has been the settled and consistent administrative practice to include insurance proceeds for accidental death under policies like these in the estates of decedents. The Treasury Regulations remain unchanged from the time of the *Ackerman* decision [3] and from that day to this Congress has never attempted to limit the scope of that decision or the established administrative construction of § 2042 (2), although it has re-enacted that section and amended it in other respects a number of times.[4] We have held in many cases that such a long-standing administrative interpretation, applying to a substantially re-enacted statute, is deemed to have received congressional approval and has the effect of law. See, *e. g.*, *National Lead Co.* v. *United States*, 252 U. S. 140, 146; *United States* v. *Dakota-Montana Oil Co.*, 288 U. S. 459, 466. We hold here that these insurance policies, whether called "flight accident insurance" or "life insurance," were in effect insurance taken out on the "life of the decedent" within the meaning of § 2042 (2).

II.

The executors' second contention is that even if these were policies "on the life of the decedent," Mrs. Noel owned them completely, and the decedent therefore possessed no exercisable incident of ownership in them at

[3] 26 C. F. R. § 20.2042–1 (a)(1). See also Treas. Reg. § 105 (1939 Code), § 81.25; Treas. Reg. 80 (1934 ed.), Art. 25; Treas. Reg. 70 (1926 ed. and 1929 ed.), Art. 25; Treas. Reg. 68 (1924 ed.), Art. 25; Treas. Reg. 63 (1922 ed.), Art. 27; and Treas. Reg. 37 (1921 ed.), Art. 32.

[4] Section 2042 was first enacted as § 402 (f) of the Revenue Act of 1918, c. 18, 40 Stat. 1057, 1097–1098. This section was re-enacted in § 402 (f) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 278–279; in § 302 (g) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 304–305, and the Revenue Act of 1926, c. 27, 44 Stat. 9, 70–71; and in § 811 (g) of the Internal Revenue Code of 1939.

the time of his death so as to make the proceeds includable in his estate. While not clearly spelled out, the contention that the decedent reserved no incident of ownership in the policies rests on three alternative claims: (a) that Mrs. Noel purchased the policies and therefore owned them; (b) that even if her husband owned the policies, he gave them to her, thereby depriving himself of power to assign the policies or to change the beneficiary; and (c) even assuming he had contractual power to assign the policies or make a beneficiary change, this power was illusory as he could not possibly have exercised it in the interval between take-off and the fatal crash in the Atlantic.

(a) The contention that Mrs. Noel bought the policies and therefore owned them rests solely on her testimony that she furnished the money for their purchase, intending thereby to preserve her right to continue as beneficiary. Accepting her claim that she supplied the money to buy the policies for her own benefit (which the Tax Court did not decide), what she bought nonetheless were policy contracts containing agreements between her husband and the companies. The policy contracts themselves granted to Mr. Noel the right either to assign the policy or to change the beneficiary without her consent. Therefore the contracts she bought by their very terms rebut her claim that she became the complete, unconditional owner of the policy with an irrevocable right to remain the beneficiary.

(b) The contention that Mr. Noel gave or assigned the policies to her and therefore was without power thereafter to assign them or to change the beneficiary stands no better under these facts. The contract terms provided that these policies could not be assigned nor could the beneficiary be changed without a written endorsement on the policies. No such assignment or change of beneficiary was endorsed on these policies, and consequently

the power to assign the policies or change the beneficiary remained in the decedent at the time of his death.

(c) Obviously, there was no practical opportunity for the decedent to assign the policies or change the beneficiary between the time he boarded the plane and the time he died. That time was too short and his wife had the policies in her possession at home. These circumstances disabled him for the moment from exercising those "incidents of ownership" over the policies which were undoubtedly his. Death intervened before this temporary disability was removed. But the same could be said about a man owning an ordinary life insurance policy who boarded the plane at the same time or for that matter about any man's exercise of ownership over his property while aboard an airplane in the three hours before a fatal crash. It would stretch the imagination to think that Congress intended to measure estate tax liability by an individual's fluctuating, day-by-day, hour-by-hour capacity to dispose of property which he owns. We hold that estate tax liability for policies "with respect to which the decedent possessed at his death any of the incidents of ownership" depends on a general, legal power to exercise ownership, without regard to the owner's ability to exercise it at a particular moment. Nothing we have said is to be taken as meaning that a policyholder is without power to divest himself of all incidents of ownership over his insurance policies by a proper gift or assignment, so as to bar its inclusion in his gross estate under § 2042 (2). What we do hold is that no such transfer was made of the policies here involved. The judgment of the Court of Appeals is reversed and the judgment of the Tax Court is affirmed.

It is so ordered.

MR. JUSTICE DOUGLAS dissents.